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CLAIMS FOR LOSSES RESULTING FROM BAN ON TRIS, S. 823

HEARINGS

BEFORE THE

SUBCOMMITTEE ON SEPARATION OF POWERS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 823

A BILL TO PROVIDE FOR THE PAYMENT OF LOSSES INCURRED AS A RESULT OF THE BAN ON THE USE OF THE CHEMICAL TRIS IN APPAREL, FABRIC, YARN, OR FIBER, AND FOR OTHER PURPOSES

MAY 4 AND 5, 1981

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CLAIMS FOR LOSSES RESULTING FROM BAN ON TRIS, S. 823

MONDAY, MAY 4, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 3:36 p.m., in room 424, Russell Senate Office Building, Senator John P. East (chairman of the subcommittee) presiding.

Also present: Senator Baucus.

Staff present: James M. Sullivan, counsel; Donna Bowles, staff assistant to Senator East; Lynda Nersesian, counsel to Senator Grassley; and Eric Hultman, general counsel, Judiciary Committee.

OPENING STATEMENT OF CHAIRMAN JOHN P. EAST

Senator EAST. The hearing will come to order.

Senator Baucus, the ranking minority member, should be here shortly. I am sure he will not object to our proceeding, since we had originally agreed to start at 3 p.m.

If I might make a brief statement for the purpose of establishing our record here, this hearing today is designed to investigate the controversy over the use of the chemical Tris as a flame retardant in children's sleepwear and to consider legislation for the relief of industry and workers who have been damaged as a result of Government action in this case.

Senator Strom Thurmond of South Carolina has long taken an interest in this Tris problem and has introduced legislation in this Congress and in the 95th and 96th Congresses, designed to permit those who have been damaged to seek compensation before the U.S. Court of Claims.

S. 823, the bill introduced in this Congress, was referred to this subcommittee on April 6, 1981, for a period of 30 days, whereupon, unless the bill has been sooner reported, the subcommittee will be discharged from its further consideration. The matter would then revert to the Judiciary Committee as a whole.

The 30-day period for consideration will expire tomorrow, May 5.

I would like to note for the record that bills creating claims against the Government normally would be referred to the Subcommittee on Agency Administration, which is chaired by Senator Grassley. The Subcommittee on Agency Administration has jurisdiction over the Federal Tort Claims Act, as well as all claims against the United States in which legislative redress is sought. All future legislation of this character would be most likely considered by that subcommittee, unless they relinquish jurisdiction.

S. 823 was referred to the Subcommittee on Separation of Powers, however, because a similar bill considered in the 95th Congress was referred to a panel of the Committee on the Judiciary which was staffed by the Subcommittee on Separation of Powers and also because of the great impact of the Tris problem on the constituents of the States represented by the Senators on this subcommittee. We are deeply interested in the outcome of this measure.

A bill, similar if not identical, to S. 823 has been introduced in the House of Representatives by Hon. Carroll A. Campbell, Jr. of South Carolina. Representative Campbell's bill is H.R. 161.

S. 823 would confer jurisdiction on the U.S. Court of Claims to determine the damages sustained by specified persons, and to render judgment therefor, as a result of designated actions taken by the Federal Government under the Hazardous Substances Act relating to the ban on apparel containing Tris.

Lost profits and attorney fees would not be included. There would be a 2-year statute of limitations as provided in the Federal Tort Claims Act.

A little brief legislative history now.

In January 1978, the U.S. Senate unanimously passed S. 1503, a bill similar to S. 823. In October 1978, the U.S. House of Representatives passed the bill by a rollcall vote of 304 to 90. Despite this considerable support for the bill, President Carter in November 1978 pocket vetoed the Tris bill.

Legislation was introduced again in both the Senate and the House during the 96th Congress. Senate bill, S. 521, was approved unanimously by the Senate Committee on the Judiciary and was passed by a unanimous vote of the U.S. Senate on December 20, 1979. No sign of support was forthcoming from the Carter administration, however, and the House did not move on the bill.

I wish to point out that S. 823 does not provide for direct payments from the Treasury for individuals and firms which may have been aggrieved. Instead this bill requires that an individual or firm claiming injury must prove the extent of damages sustained before the individual or firm may be compensated for claims against the Government.

Every effort should be made, of course, to protect the public from harmful chemicals. This is especially true where the health of children is at stake. However, we feel the Federal Government has an obligation to exercise its regulatory powers wisely and with due regard for the impact of its actions on the legitimate business activities of American industries and the livelihood of workers employed in such industries.

It is a principle of American law that even the Government is not entirely immune from responsibility for consequences of its conduct when that conduct unreasonably injures private parties.

The purpose of this hearing is to determine whether the circumstances of the Tris controversy justify authorizing claims against the United States, as S. 823 is designed to do.

The subcommittee will not seek to determine the degree of actual damage, if any, sustained by the parties nor will the subcommittee seek to reach a final determination of legal liability in

the event such damages are found. That would be the province, of course, of the U.S. Court of Claims if S. 823 should be approved.

To assist our subcommittee, we have several witnesses who have offered their views. Several groups have submitted written statements for our consideration.

I wish at this point to place S. 823 in the record and announce that the record will remain open until 5 o'clock Tuesday, May 5, for submission of statements and other materials.

[A copy of bill S. 823 follows:]

II

97TH CONGRESS
1ST SESSION

S. 823

To provide for the payment of losses incurred as a result of the ban on the use of the chemical Tris in apparel, fabric, yarn, or fiber, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 27 (legislative day, FEBRUARY 16), 1981

Mr. THURMOND (for himself, Mr. KENNEDY, Mr. HARRY F. BYRD, JR., Mr. HOLLINGS, Mr. WARNER, Mr. HELMS, Mr. HEFLIN, Mr. DENTON, and Mr. EAST) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To provide for the payment of losses incurred as a result of the ban on the use of the chemical Tris in apparel, fabric, yarn, or fiber, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Court of Claims shall have jurisdiction to hear, determine, and render judgment upon any claim for losses sustained by any producer, manufacturer, distributor, or retailer of children's sleepwear, or by any producer, converter, manufacturer, distributor, or retailer of fabric, yarn, or fiber

contained in or intended for use in children's sleepwear, as a result of the actions taken by the United States under the Federal Hazardous Substances Act on April 8, 1977, and thereafter relating to apparel, fabric, yarn, or fiber containing Tris (2,3-dibromopropyl) phosphate: *Provided, however,* That such children's sleepwear and such fabric, yarn, or fiber contained in or intended for use in children's sleepwear was subject to the requirements of or for use in compliance with the mandatory Federal flammability standard FF3–71, or FF5–74, at the time of its manufacture.

(b)(1) In determining the validity of any claim under this Act and the amount of the losses sustained for which such a claim is brought, the court shall consider the following factors:

(A) The degree to which reasonable alternatives to Tris (2,3-dibromopropyl) phosphate existed at the time the Federal Government established the applicable mandatory Federal flammability standard referred to in subsection (a).

(B) Whether it would have been feasible, or reasonable, for the claimant to have tested Tris (2,3-dibromopropyl) phosphate for chronic hazards at the time the Federal Government established such flammability standard.

(C) The degree to which the Federal Government, prior to establishing such flammability standard, tested Tris (2,3-dibromopropyl) phosphate for toxicity, or other health hazards, and disseminated the results of these tests.

(D) The degree of good faith demonstrated by a claimant in seeking to comply fully with such Federal flammability standard.

(E) The extent to which a claimant may have relied in good faith on assurances from suppliers that the products containing Tris (2,3-dibromopropyl) phosphate were safe.

(F) The degree to which a claimant acted reasonably in using Tris (2,3-dibromopropyl) phosphate for the time period that such substance was used.

(G) The degree to which a claimant, in good faith, complied with actions taken by the United States under the Federal Hazardous Substances Act on April 8, 1977.

(2) In determining the amount of the losses for which a claim is brought under this Act, the amount of such losses shall not include lost profits, proceeds from distress sales, attorney's fees, or interest on any such loss resulting to any producer, converter, manufacturer, distributor, or retailer of

such children's sleepwear, or to any producer or manufacturer of fabric, yarn, or fiber.

(c)(1) The measure of losses for producers or manufacturers of children's sleepwear shall be the cost of producing goods referred to in paragraphs (1) and (2) of this subsection, held in stock on the date of enactment of this Act, less the fair market value, if any, of such goods and less the amount of any reimbursement received.

(2) In addition to the losses determined under paragraphs (1), (2), and (3) of this subsection, a claimant may also be compensated for unreimbursed costs of transportation paid for the return of such sleepwear garments, fabric, yarn, or fiber.

(d) No claim under this Act may be brought as a class action nor may any claim under this Act be brought by two or more parties unless damages are claimed to be jointly recoverable or are disputed among the parties claimant.

(e) Upon payment of any claim under this Act, by court judgment or by settlement, the United States shall be subrogated to the claimant's rights to recover losses or assert a claim against any person or organization relating to the subject matter of the claim paid by the United States. The claimant shall execute and deliver instruments and papers and take whatever steps are necessary to secure such rights in the United States in order to be entitled to the entry of a

judgment by the Court and payment under this Act, and the failure of the claimant to perform such acts or take such steps shall constitute cause to deny the entry of such judgment and manufacturing the sleepwear garment plus the cost of the fabric, yarn, or fiber used for such production or manufacture, held in stock on the date of enactment of this Act, less the fair market value, if any, of the sleepwear garment or the fabric, yarn, or fiber. If the sleepwear garment or the fabric, yarn, or fiber has been resold after April 8, 1977, but prior to such date of enactment, then the measure of losses shall be the cost of producing or manufacturing the sleepwear garment plus the cost of the fabric, yarn, or fiber less the proceeds from any such sale.

(3) The measure of losses for producers, converters, or manufacturers of fabric, yarn, or fiber shall be the cost of producing, converting, or manufacturing the fabric, yarn, or fiber plus the cost of the raw materials used for such production, converting, or manufacture, held in stock on the date of enactment of this Act, less the fair market value, if any, of the fabric, yarn, or fiber. If the fabric, yarn, or fiber had been resold after April 8, 1977, but prior to such date of enactment, than the measure of losses shall be the cost of producing, converting, or manufacturing the fabric, yarn, or fiber plus the cost of the raw materials used for such production,

converting, or manufacture less the proceeds from any such sale.

(4) The measure of losses for distributors and retailers shall be the distributor's or the retailer's purchase price for payment. The failure of the claimant to perform such acts or to take such steps shall not limit or adversely affect the right of the United States to act as subrogee or assignee to the full extent of its payments under this Act. Any purported limitation on the right of the United States to act as assignee or to become subrogated to the rights of a claimant shall be without any effect, to the extent that the United States has made payments under the Act.

(f) Any claim under this Act shall be barred unless commenced within two years after the date of enactment of this Act.

Senator EAST. This subcommittee will hold hearings on S. 823 again tomorrow, Tuesday, May 5, from 3 to 5 p.m. in room H-313 in the Capitol on the House side.

Senator Thurmond had intended to be with us this afternoon, but he had to make an airplane at 3:30 p.m. and due to the delay could not be here.

He wanted to introduce our witness from South Carolina, the Honorable Thomas Marchant, who has had a long involvement with Tris legislation.

Senator Thurmond has asked me to have this statement inserted in the hearing record. Hearing no objection, I so order.

PREPARED STATEMENT OF SENATOR STROM THURMOND

Mr. Chairman, I want to commend the able Senator from North Carolina for having this hearing on legislation to provide relief to producers, manufacturers, distributors, and retailers of children's sleepwear

As I am sure my colleagues know, considerable efforts have been exerted in the past to get this legislation passed into law. I will not take the time of the subcommittee to recount the long history of this measure, but simply note that with the added leadership of Senator East I am anticipating early and successful action in this Congress.

Mr. Chairman, as you know, this is not a bill to bail out anybody. The bill provides no authority for the immediate payment of Government funds. Instead, it establishes a careful procedure for the examination of claims for relief to the U.S. Court of Claims. Only after a finding that a claim is of sufficient merit will the Congress be asked to provide appropriate relief.

The background of this legislation provides a clear example of overregulation by the Federal Government. It is just one more case where private industry relied on Government actions, only to be penalized for such reliance.

I support this legislation and hope the committee will be able to approve it and send it to the floor early this year.

Senator EAST. We have with us this afternoon Mr. David T. Shirey, president of Shirey Co., Inc., of Greenville, Tex. He is accompanied by Mr. Fred Shippee, director of technical services, American Apparel Manufacturers Association.

We also have Mr. Thomas M. Marchant III, vice president of Stone Manufacturing Co., Greenville, S.C.

We have Joanne Mattiace, Esq., attorney for governmental affairs, Sears, Roebuck and Co. She is accompanied by Nancy L. Buc, attorney, of Weil, Gotshal & Manges.

As I understand, and I will happily stand corrected, Ms. Mattiace is under some severe time restrictions here. We could take her testimony first. As I understand it, Mr. Shirey and Mr. Marchant are content with our poaching in that way.

I hear no strenuous objections.

Ms. Mattiace, if you please will come up to the witness table.

I wish Senator Baucus well in terms of his eventually showing. I think he will.

Senators Denton, Hatch, and Heflin are also members of this committee. Senator Denton is a cosponsor of the bill. Senator Heflin is a cosponsor of the bill. So there is considerable support on the subcommittee for the measure.

Our responsibility at this point is to conduct these hearings to collect information. We will not ourselves, as a subcommittee, be making a recommendation on the bill. We will simply pass our findings back to the Judiciary Committee as a whole.

If the record could please clarify those matters for us, we will go on.

I would appreciate it if the witnesses could summarize their testimony. It will save all of us time. Your written statements will be a part of the record, so I would like to encourage you to summarize as best you can your points, consistent with making them. Don't misunderstand me. I am not trying to box you in where you feel we are going to abbreviate the record too much.

Your written statements will be a part of the record. You are permitted to read them, and that is fine. But if you could summarize, that would be helpful. Then we could get on to our questions and move on to the next witnesses.

I welcome the two of you here today.

Ms. Mattiace, if you would like to proceed.

STATEMENT OF JOANNE E. MATTIACE, ATTORNEY, SEARS, ROEBUCK & CO., INC., ON BEHALF OF THE NATIONAL RETAIL MERCHANTS ASSOCIATION, ACCOMPANIED BY NANCY L. BUC, ATTORNEY, WEIL, GOTSHAL & MANGES

Ms. MATTIACE. Thank you, Mr. Chairman.

I appreciate your allowing me to testify first.

I am Joanne Mattiace of Sears, Roebuck Co. I am here today to represent the National Retail Merchants Association and the retailing community.

I appreciate the opportunity to appear here today on behalf of the National Retail Merchants Association to support Tris legislation to indemnify retailers and others who suffered financial hardship as a result of the 1977 Tris ban. NRMA is a voluntary, nonprofit trade association which represents 3,700 members who operate a total of 37,000 general merchandise and speciality stores throughout the United States. A majority of NRMA's members are small independent retailers with annual sales of $1 million or less. Since 1978 NRMA has consistently supported congressional efforts to allow fabric mills, garment manufacturers, and retailers to recoup the losses which stemmed from the Consumer Product Safety Commission's costly decision to ban Tris from children's sleepwear.

Many elements of the apparel industry, including fabric mills, garment manufacturers, distributors, and retailers, have sufferd severe economic losses and disruptions in complying with Tris regulatory requirements. I will address particularly the special factors which make it not only equitable, but virtually imperative, for retailers to be eligible for the kind of reimbursement provided for in S. 823.

Retail merchants have been on the firing line since the announcement of the Consumer Product Safety Commission immediate ban on children's wear containing Tris on April 7, 1977. Retailers immediately halted their sales of Tris-treated children's sleepwear, cleared the products from their shelves, and started to make refunds to customers who returned garments and to notify other customers of the product hazard and the repurchase program.

Under the Federal Hazardous Substances Act, 15 U.S.C. 1261 et seq. and related regulations, 16 C.F.R. part 1500, garment manufacturers would ordinarily have been required to repurchase Tris-treated garments as banned hazardous substances from retailers to which they had sold them and to reimburse the retailers for their

administrative costs and customers' transportation expenses. Although under the law manufacturers were required to repurchase the banned merchandise, the later dissolution of the ban left many retailers with significant losses and nowhere to turn. Some retailers were unable to obtain reimbursement during the ban because manufacturers of Tris-treated fabric and garments had gone out of business, were on the brink of bankruptcy, or refused to repurchase products from retailers, while in other cases it was impossible for retailers to determine the manufacturer of the garments. In all of these situations, retailers, including many small businesses with limited financial resources, have had to absorb the cost of the merchandise.

Retailers have also incurred significant expenses well above the cost of unsalable merchandise. Retailers' personnel spent many hours handling product repurchases from customers, determining which garments contained Tris, and segregating and packing them. Retailers have had to ship merchandise back to the manufacturers, and in many cases to store garments for long periods. Finally, but by no means least, throughout this situation only retailers dealt directly with an anxious and confused public, and so it is retailers who suffered most from declines in customer confidence and good will.

Retailers want a chance, along with the others who have been injured, to present our cases to the court of claims and receive equitable compensation for our losses. Retailers who have already been fully reimbursed by manufacturers or others in the distribution chain for the cost of returned goods will of course receive no additional payment. Only those who have not been compensated fully need the opportunity to recoup their losses.

While we fully support the intent of the legislation, the bill before you fails to provide for fair compensation to retailers and distributors who have suffered losses on Tris-treated merchandise which is no longer in their possession. Retailers who returned the affected garments to the manufacturer or distributor should still be entitled to recover their losses under the formula in the bill, with appropriate documentation. Revising the language to permit retailers to claim compensation for losses on garments they no longer hold would give them the same rights under the bill as producers and manufacturers of sleepwear, fiber, and yarn, who may be reimbursed for losses on products no longer in their possession. NRMA has submitted language to your staff which would accomplish this change.

This body has twice passed Tris legislation similar to this, only to have it vetoed or resisted by the last administration. NRMA urges you to pass this legislation once again so that our members and others can be compensated fairly for our losses attributable to Tris.

Thank you.

Senator EAST. Thank you.

For purposes of building our record here, I would like to ask several questions.

You have stated that under the Federal Hazardous Substances Act, and related regulations, that retailers would ordinarily have required garment manufacturers to repurchase this Tris-treated

garment from retailers as the ban of hazardous substances. Is that true?

Ms. MATTIACE. That is true.

Under the Federal Hazardous Substances Act, there is a repurchase provision. Basically, it would have the distribution chain work in reverse. That is, we would return goods from our customers. They would come to us as a retailer. We would hand them back over to a distributor who, in turn, would go back to the manufacturer and then, of course, ultimately back to the mill.

The cost of goods and transportation expenses, plus administrative overhead, would be reimbursed under that system.

Senator EAST. As we understand the chronology of events here, the Consumer Product Safety Commission's ban on Tris-treated garments was issued in April of 1977. Then you have stated that a later dissolution of the ban left many retailers with significant losses and, in effect, nowhere to turn.

Would you please elaborate on how the later dissolution of the ban would leave retailers with nowhere to turn? In effect, you are left holding the bag one might say.

Ms. MATTIACE. And the bag was full of pajamas.

Basically, the Commission's ban took place in April. There was a lot of publicity surrounding it.

Subsequently, when a court overturned the Commission's decision to ban Tris, retailers could, I suppose, legally sell the goods. However, the public was pretty confused and pretty anxious about the safety of their children. As a practical matter, these goods became unsalable.

Retailers decided not to sell them again.

It was at that point that we had the pajamas, but we had nowhere to send them.

Senator EAST. If your retailers were unable to require the manufacturers to repurchase these Tris-treated garments between the date of the April 1977 ban and the later dissolution, what is your estimate of the likelihood that those retailers now would pursue a claim under S. 823, if it is enacted into law?

Ms. MATTIACE. Ms. Buc is counsel to NRMA. I think I will let her answer this one.

Ms. BUC. We have no certain way of knowing in advance the answer to that question for all of NRMA's members, who number in the several thousands.

We think it is likely that, depending on what the criteria are and how they fit individual members in particular situations, there will be at least some suits. In any event, there are members who have expressed the view that they still have losses which have not been made whole and which they think won't be made whole, except in light of a bill like this.

So I think there are some claimants who would take advantage of this if the bill passes, as we hope that it does.

Senator EAST. To this point, what remedy has been available for retailers who purchase these Tris-treated fabrics from garment manufacturers and then file for bankruptcy as a result of the Consumer Product Safety Commission's ban?

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Ms. BUC. Theoretically, at least, they have a claim in bankruptcy under what contractual or tort remedies might be available to them.

The problem, of course, is the money—what kinds of claims there were against that bankrupt's estate. The advantage of a bill like this is that it makes money available from a source that has not previously been available. At least NRMA's members think it is the right source, considering who is responsible for the problem.

Senator EAST. So, in effect, as the retailers see it, they are innocent parties who were greatly aggrieved here.

As a practical matter, absent enactment of S. 823, or some reasonable facsimile thereof, you really have no effective remedy under the law to recover your losses which were—certainly, as you see it—incurred not by your own doing. Is that about where we are?

Ms. BUC. Just exactly.

Senator EAST. Senator Baucus?

Senator BAUCUS. Thank you, Senator East.

First of all, I want to thank the chairman very much for scheduling these hearings. Our schedules are very busy and some of us are off in our home States during recesses and weekends, and I want to thank the chairman for holding the hearing at this time.

My first question, is this. In your view, should the Tris ban be repealed?

Ms. MATTIACE. As of this time, there actually is no ban. A court did subsequently nullify the ban and the Commission is no longer working with a valid ban.

Senator BAUCUS. In your view, should garments and wearing apparel be treated by Tris and sold as freely as any other garment and treated as any other product?

Ms. MATTIACE. I am not a scientist. I think I would feel more comfortable answering that question had all of us had an opportunity to be heard back in April 1977 and had there been a hearing on the toxicity or carcinogenicity of Tris.

Senator BAUCUS. Is it the retailers position that Tris should be readily sold and made available to the public?

Ms. MATTIACE. I don't think any retailer would want to sell Tris-treated garments at this point to our customers.

Ms. BUC. At this point it is past history.

Whatever the merits of the controversy would have been in the 1977, at this point, as Ms. Mattiace has said, Tris-treated garments are unsalable. That is not the issue any more. The issue is simply whether the retail community, like other people in the distribution chain, are to be made whole.

Senator BAUCUS. My question really goes to the equities on both sides. The Consumer Product Safety Commission, trying to do its duty, looked into the subject and decided that Tris should be banned. The retailers and the manufacturers make the argument that they are innocent parties; that they are harmed by Government action, and they should be indemnified.

I am trying to determine the degree to which the parties were acting innocently, and with no warning. It has some bearing on whether the manufacturers and retailers think that Tris is a good, healthy product or whether they don't.

Ms. BUC. I think the retailer's view is that had the Commission continued on the course it started on, probably we would not be here.

That is to say, had the Commission perfected its ban—even if retailers might have thought that was an unwise course—by operation of law, retailers would have had the right to recoup their losses under the Federal Hazardous Substances Act. That is what the law already provides.

What happened to the retailers is that they got caught in a gap. Try to remember the chronology.

First there is a ban on April 7. The apparel manufacturers, perfectly within their rights, go to court. Judge Hart essentially says: I don't think much of this ban. The Commission says: OK. Basically, we will dissolve it.

Whether there was a ban at that point is very hard to say. But at the moment that the Commission acquiesced in Judge Hart's decision, even though they were still fighting down in the district court in the fourth circuit, at that moment the retailer's right to get back the money that they were paying over to consumers who were returning the goods because of the publicity evaporated.

Then there is no ban.

Finally, the Commission just folds up its tent and says: We are not going to finish this ban. Retailers, you are the ones who paid all the consumers for their goods.

Many retailers, by the way, took back not only their own goods but goods that hadn't even been Tris-treated or goods that had been washed, or whatever.

So the retailers who were at the end, as Ms. Mattiace said, on the firing line were left with the consequences of both the ban and no ban.

It is in that circumstance—not the merits of the ban itself, but this rather unusual circumstance—that we are really here before you saying that is past history. At least make us whole.

Senator BAUCUS. Is there a ban now applicable to manufacturers?

Ms. BUC. I don't think so.

Senator BAUCUS. So today a clothing manufacturer, if he wanted to, could produce Tris-treated garments.

Ms. BUC. Theoretically.

Look what the Commission did. They've got six cases or five cases.

Senator BAUCUS. But my question is—and it is perhaps not one you can answer—if that is the case, why don't manufacturers produce Tris? If it is not banned any more?

Ms. BUC. As I say, they can speak for themselves. I would venture the guess that they will agree with the retail community. Essentially that is past history.

The question isn't——

Senator BAUCUS. But either the manufacturers think there is some merit to the objections to Tris or, if there is no merit, at least the public thinks there is merit and the garments are unsalable. I am just curious why they aren't manufacturing garments.

Ms. BUC. I think that is exactly the crux of a court of claims question, if I may say so. Here we are with a situation where the Government did something.

I think the argument is not whether or not it was in good faith. It was in good faith. But the fallout, if you will, the commercial effects which were wholly unintended were enormous.

At this point the public is protected. Nobody wants to sell Tris-treated garments—certainly not the retail community and, I would venture, not the manufacturing community that will testify after us.

The question is what to do now to remedy the very severe economic losses.

Senator BAUCUS. What is the cost estimate to a retailer?

Ms. BUC. It varies enormously.

Senator BAUCUS. Total.

Ms. BUC. I don't think we have a total. We don't know.

Senator BAUCUS. How much would Uncle Sam have to pay if the bill were amended to include retailers. How much would the retailer's portion of damages be?

Ms. BUC. We don't know, because we don't know how many people would claim.

Senator BAUCUS. Do you have any estimates at all?

Ms. BUC. I'm afraid not.

Senator BAUCUS. How many different retailers would qualify if the bill were amended?

Ms. BUC. We don't know that either.

We know that the total number of retailers who have ever sold Tris is probably a substantial percentage of the National Retail Merchants Association's total membership, which is on the order of 3,500 companies.

But how many would actually claim, I think, depends on what the form is of the bill and whether they feel it is worthwhile.

At this point, we do know that members are asking us to preserve this opportunity. We don't know how many would claim.

Senator BAUCUS. I have a memorandum from the Congressional Budget Office which estimates the retailers' losses to be approximately $1 million. Does that seem accurate and within the ballpark?

Ms. BUC. I simply can't answer that. I don't know the source of their figures.

I don't believe they came to us, so I don't know.

Senator BAUCUS. Were the bills that passed Congress before bills that included retailers in the indemnification?

Ms. MATTIACE. Yes, sir. Those were in 1978 and 1979.

Senator BAUCUS. Do you know why the bill which has been introduced as S. 823 does not include indemnification for retailers? Prior bills did.

Ms. MATTIACE. This bill, S. 823, does actually include retailers. What we would like to see, however, is an amendment that would allow retailers to ask for recovery, even though they might no longer possess any Tris-treated garments in their inventory.

Senator BAUCUS. So you want extension of the bill passed before.

Ms. BUC. I don't believe so. I don't believe the previous bills had that limitation. That is my recollection.

Senator BAUCUS. So you want what?

Ms. BUC. We want to go back to the bill that passed but was vetoed which essentially incorporated the provision that, for whatever reason, was not included in the original draft of S. 823.

Senator BAUCUS. I guess I am asking what it was not. You don't know why?

Ms. BUC. No; I can't answer that.

Senator BAUCUS. I have no further questions. Thank you, Mr. Chairman.

Senator EAST. Thank you, Senator Baucus.

Ladies, if you have no further comments, I have no additional questions and you may be excused.

Ms. MATTIACE. Thank you.

Ms. BUC. Thank you.

Senator EAST. We would appreciate it if Mr. David Shirey, Mr. Fred Shippee, and Mr. Marchant would come forward please.

Gentlemen, I welcome you to our subcommittee hearing.

Mr. Shirey, if you would like to make your statement please. If you prefer to summarize, you can and your written statement will be a part of the record. And the same for the rest of you.

Again, I don't wish to restrict you. If you feel uncomfortable doing it that way, proceed in any manner you wish. I want you to feel comfortable.

STATEMENT OF DAVID T. SHIREY, PRESIDENT, SHIREY CO., INC., GREENVILLE, TEX., AND CHAIRMAN-ELECT, AMERICAN APPAREL MANUFACTURERS ASSOCIATION, ACCOMPANIED BY FRED SHIPPEE, DIRECTOR OF TECHNICAL SERVICES, AMERICAN APPAREL MANUFACTURERS ASSOCIATION; AND THOMAS M. MARCHANT III, VICE PRESIDENT, STONE MANUFACTURING CO., GREENVILLE, S.C.

Mr. SHIREY. Thank you, Mr. Chairman. My name is David Shirey. I am president of Shirey Co., Inc., in Greenville, Tex. We are a family-owned, children's sleepwear manufacturer. At the present time, I am also chairman-elect of the American Apparel Manufacturers Association. Appearing with me today, as you have already indicated, are Fred Shippee, technical director of the AAMA, and another spokesman from a children's sleepwear firm who will be speaking momentarily.

The AAMA is the official trade association for the apparel industry. About 75 percent of the children's sleepwear manufacturers, about 100 in number, are members of this association. It is on behalf of the association, as well as those of us who are members of this particular segment of the industry, that I will be speaking to you this afternoon, and urging you to vote for this legislation which you are considering.

As you mentioned, Senator, in your opening remarks, we are also delighted to see this subcommittee reviewing this particular legislation, in view of the representation from both Alabama and North Carolina. In Alabama, textiles and apparels are the largest single employer. In North Carolina, they are the second largest.

CHILDREN'S SLEEPWEAR INDUSTRY

By and large, the 100 or so children's sleepwear manufacturers are small producers, even within the apparel segment of the industry complex. Most of us are undercapitalized and are rather small, depending on credit sources from either borrowing on our invoices, our inventories, or from our trade credits received from our suppliers. Many of us have only 100 employees, or less. In the aggregate, we have approximately 27,000 employees—productive people who are earning wages and contributing to their communities.

Our total output amounts to only approximately $500 million a year. Because of the fact that we are small producers, typically, as members of the apparel industry, many of our manufacturing facilities are in rather small communities. I have a plant employing only 50 people, which happens to be the largest employer in the particular town where this plant is located.

The word Tris has become, I suppose, almost a household term, especially for those of us in the children's sleepwear business. It has received widespread, negative publicity as a result of the actions of the Consumer Product Safety Commission. The story on the public side has been rather well-publicized and well-known over the years. There is another side, and that is the side those of us in the industry experienced as a result of the ban.

REGULATORY BACKGROUND

In looking back a few years, to update or go through the scenario that led to this disaster, it really began in 1953 when Congress passed the first Flammable Fabrics Act, the purpose for which really was to remove very hazardous fabrics from the market. It did so very effectively. This was a mill standard relating to fabrics only.

In 1967, Congress amended the Flammable Fabrics Act, allowing the Secretary of Commerce to add additional flammability standards as they might be needed to protect the public. In July of 1971, the Secretary of Commerce promulgated the first children's sleepwear standard. The second standard in 1974 was also promulgated, in this case by the Consumer Product Safety Commission which by this time had assumed the responsibilities for enforcing and administering the Flammable Fabrics Act. These new standards, both of them passed in the 1970's, not only covered fabrics which had been covered by the 1953 and 1967 standards, but also imposed restrictions on apparel producers to make sure that once the fabrics having met this standard were received in the apparel plant, that they were tested again in their configuration of construction to insure that the standards were still met.

This first standard had particularly stringent requirements which required for the most part the addition of chemicals to insure adherence to the standard. With very, very few exceptions, apart from chemical treatment, this standard could not be met.

Those of us in the industry were concerned about the addition of chemicals to our products. In the early hearings before the Department of Commerce, we raised the questions dealing with the possibility of dermatological and toxicological effects of those chemicals at the time the standards were first considered in hearings before

the Department of Commerce. Yet those pleas for further consideration of the side effects that might be created in meeting this extremely stringent standard were ignored by those responsible for putting out the standard. The standard, as originally requested by some of the people who were proposing it, was put in place as it was suggested.

This, I might add, was over the objections of some of the people in the medical community who said that the standard was really being placed in a fashion that was too strict. It was going further than even they had desired, covering safety beyond that which they had asked for at the time they approached the Government to try to get flame retardancy that had not been present previously in sleepwear products.

THE USE OF TRIS

It was soon found, after these standards were promulgated, that products produced from fabrics which we later found contained Tris met immediate consumer acceptance, primarily because these fabrics were more like the fabrics that the customer had previously been accustomed in these product categories.

Our industry is extremely competitive. With 100 producers, most of us small, we respond very quickly to whatever product sells and try to build on those sales. We were trying to recover from the onslaught of the standards, once they had been put into effect. Once we began to find fabrics that moved and found consumer acceptance even under these new standards, we gravitated rapidly in that direction. Unknowingly to us in the apparel industry, by 1976, it is estimated now, over half of our product contained the chemical Tris. Though at that time—prior to 1976—we had never even heard the word Tris.

In March of 1976, a private organization, the Environmental Defense Fund, filed a petition before the Consumer Product Safety Commission seeking to get a rule that the Commission would promulgate requiring all garments containing Tris to contain an instruction to wash three times before wearing. The EDF at that time, in March of 1976, reported that Tris had been found to be a mutagent under the newly developed Ames Test which was claimed by some scientists to predict possible human carcinogenicity.

For the most part, those of us in the industry at that time heard the word Tris for the first time. We didn't add the chemical to the fabric. We only purchased fabrics to put in our apparel that already came to us meeting the standard. So we had never heard of the chemical and didn't know that it was contained in the fabrics that we were purchasing. We had no idea of a possible health hazard. Nevertheless, because of the severe impact of the publicity which obviously came out of the EDF petition, we began moving immediately to move the fabrics that did not contain Tris.

In my own case, I didn't accept for my own product line a single fabric that we had not already committed for that contained Tris after I first heard the word. But this did not insulate me from rather significant damage as a result of the recall that later occurred under the ban.

EDF filed a second position with the Consumer Product Safety Commission in February of 1977, demanding that all garments

containing Tris be removed from sale. The CPSC did not respond immediately. EDF filed a lawsuit against the Commission in Federal District Court. It should be added that at this time, in 1977, there was no chemical Tris being added to sleepwear fabrics being sold. For the most part, all products that contained Tris-treated fabrics had already moved out of the manufacturer's chain of distribution. Most of the fabrics that we then added to our line were less-appealing to the consumer. In some cases, they were higher in price; but they continued to meet the standard. Obviously, we moved to them, even before the ban took effect.

On March 31, 1977, representatives of AAMA met with the CPSC to discuss the possible effect of the ban. At that time, we were really trying to discuss with them only the possible effects on the industry that various alternatives to them in dealing with the ban might develop for us.

THE BAN

On April 7, 1977, the Commission issued the ban. Our industry was faced with the responsibility of repurchasing all unwashed garments containing Tris, whether they were in the ultimate consumer's hand or in the retailer's shelves. On April 13, 1977, the Commission, in clarifying the ban, dealt us even a further blow by indicating that us, as children's sleepwear manufacturers, were the only manufacturers, as defined in the Federal Hazardous Substances Act, and therefore we alone were left with the full economic responsibility for repurchase of these products. The unfairness of this interpretation was further driven home, considering the fact that we neither put Tris into the product nor knew of its presence nor had any way of evaluating its effect.

By May of 1977, after the AAMA had filed suit on behalf of its members in Federal District Court in the District of Columbia, Judge Hart required the Commission to expand its ban, suggesting that they had acted arbitrarily and capriciously and ordered the Commission to redefine the products covered by the ban and the repurchase responsibility. The CPSC, through some maneuvers, averted the responsibility for direct compliance with this order but did reissue the ban at that time to include the Tris chemical manufacturer, fiber, yarn, and textile manufacturers, as well as other segments of the children's sleepwear industry in the expanded ban.

We thought that this would possibly give us some economic relief. However, almost simultaneously with this act, Spring Mills, a textile manufacturer, sued the CPSC in District Court in the District of South Carolina with the result that the entire ban was overturned. Despite the decision in the South Carolina case, in which Spring Mills was able through that court to get the ban removed, the CPSC issued a statement of policy in December of 1977 under which we have operated in an almost absolute ban environment. It has been a de facto ban, because of the policy position that the CPSC took at that time.

IMPACT ON INDUSTRY

What has been the impact on our industry? Some of us have gone out of business. Some of us have continued to operate—in

many cases, sort of on a shoestring—operating in some cases with SBA loans and in some cases the confidence of our suppliers or local bankers. We have continued to survive, but we believe that the inequities created in this situation where we alone bore the penalty of an act of which we had absolutely no knowledge is absolutely dependent in its resolution on the actions which you contemplate today in passing the bill that is before you.

One of the best indications of the need for this legislation is given in a letter of April 27, 1978, to the House Committee on the Judiciary Chairman Rodino from the five commissioners of the CPSC. The commissioners stated that they supported this legislation, and that our industry had in fact been economically harmed, through no fault of our own.

We agree that this legislation should consider the various circumstances regarding the use of Tris. These recommendations were incorporated into this legislation, which enables the Court of Claims to confer on us, the small children's sleepwear manufacturers, the remedies to our individual losses. We believe that the issue under consideration today is a consequence of actions taken by the Consumer Product Safety Commission, April 7, 1977, and the continuing inequities that have flowed from those acts.

There have been a great number of events that have transpired since that April ban. However, all the acts, whether they have been proclamations by the CPSC, policy positions of that group, court actions, and nothing else that we have been able to accomplish with our suppliers, the Government, or through the courts has dealt with the basic issue which this Congress—the Senate and the House—passed in the 95th Congress, and the Senate again in the 96th Congress.

So we are delighted to make this presentation to you. We appeal to your sense of justice and feel that we are resting our case in good hands. We would be happy to answer questions.

Senator EAST. Thank you, Mr. Shirey.

[The prepared statement of Mr. Shirey follows:]

PREPARED STATEMENT OF DAVID T. SHIREY

Mr. Chairman, and Members of the Subcommittee, my name is David T. Shirey, and I am President of the Shirey Company, Inc. and Chairman-Elect of the American Apparel Manufacurers Association (AAMA). Appearing with me is Fred Shippee, Technical Director of the AAMA. The AAMA is the trade association which has represented and served as the official spokesman for the apparel manufacturing industry for the past forty years and represents 75 percent of the estimated 100 domestic manufacturers of children's sleepwear. It is on behalf of AAMA that I speak to you today on the plight of those apparel manufacturers engaged in the business of making and selling children's sleepwear, and it is on behalf of AAMA that I urge you to vote favorably on the legislation to indemnify our industry for their losses as passed by the 95th Congress and again by the U.S. Senate in the 96th Congress.

By and large, the 100 or so children's sleepwear producers are small manufacturers. Most of us are under-capitalized, and must depend on the credit of our suppliers and on our ability to obtain loans on accounts receivable, to stay in business. Many producers have less than 100 employees, and our total annual output amounts to only $500 million. Despite the relatively small size of this segment of the industry, it provides jobs for some 27,000 people. These are taxpaying, productive jobs which contribute to the economy. In many instances, children's sleepwear plants are located in very small communities where, despite their small size, they might still be a town's largest employer. One of my own plants employing only 50 people exactly fits this description. If this plant were forced to close its doors, the economic impact on this small community would be enormous.

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The word Tris is, I am sure, familiar to all of you. The efforts of the Consumer Product Safety Commission to ban products containing Tris have received widespread publicity, and there are probably few Americans today that have not heard of Tris at one time or another. The story that has not been told, however, is the devastating effect of the Commission's actions on our very small industry. In order for me to tell this story, though, it will be necessary to give you a little background.

In 1953, Congress passed the Flammable Fabrics Act. This law was designed to remove very combustible fabrics from the marketplace, and it required textile manufacturers to meet a fabric flammability standard. In 1967, Congress amended the Flammable Fabrics Act to permit the Secretary of Commerce to issue additional flammability standards, and in July 1971 the Secretary promulgated the first children's sleepware standard. In 1974, a second children's sleepware standard was promulgated, this time by the CPSC, which had assumed responsibility for administering the Flammable Fabrics Act. These new standards required both textile and apparel manufacturers to meet an extremely stringent performance level by a test method that was altered by the CPSC after the Tris ban but which continues to provide the needed flame resistance for these children's products. In most instances, the standards necessitated the addition of flame retardant chemicals to the fabrics used in children's sleepwear. It should be added that the apparel industry, along with other segments of the textile industry, raised questions before the Department of Commerce about the possible adverse dermatological and toxicological effects of these chemicals. The government, however, ignored our concerns and promulgated the initial standards without change.

It was soon found that certain fabrics containing Tris (2, 3-dibromoprophyl) phosphate were the most desired by the consumer in terms of cost and appearance and wear characteristics and could most consistently meet the stringent standards requirements. We are in a highly sensitive, competitive industry and as soon as a fabric starts to achieve consumer acceptance, our industry will respond. For this reason, there was a rapid increase in the use of Tris-treated fabrics in children's sleepwear, and by early 1976, we estimate that over half of all children's sleepwear fabrics contained this one flame resistant chemical.

In March 1976 a private organization, the Environmental Defense Fund (EDF), filed a petition with the CPSC seeking a rule that garments containing Tris fabrics be labelled with instructions to the consumer to wash the garments three times before wearing. EDF reported that Tris had been found to be a mutagen under the newly developed Ames Test which was claimed by some scientists to predict possible human carcinogenicity. For most of these small manufacturers of children's sleepwear, the March 1976 petition was the first time that we had ever heard of Tris, or of any suspicion that it might be a possible health hazard. Nevertheless, because of the adverse public reaction generated by the EDF petition, industry promptly took steps to replace the Tris-treated fabric in our garments. In many instances, however, immediate replacement was impossible, since it is generally a 12-month manufacturing cycle from the time that fabric is purchased until the time that the garments might appear in the marketplace.

EDF filed a second petition with the Consumer Product Safety Commission on February 7, 1977 demanding that all garments already produced from fabric containing Tris be removed from sale. When the CPSC did not act quickly enought on this second petition, EDF filed a lawsuit against the Commission in federal district court. It should be added that by this time, the chemical Tris was no longer being sold for apparel uses and sleepwear manufacturers had shifted to fabrics containing alternative chemicals to meet the federal standards. These fabrics were less appealing from all points of view, but an economic necessity in the face of a disastrous CPSC action. On March 31, 1977 representatives of AAMA met with the Commission to discuss the economic impact of a Tris ban on the Children's sleepwear industry. EDF had been pressuring the Commission to issue a ban under the Federal Hazardous Substance Act, and we found to our dismay that this Act contained an automatic repurchase requirement. We stated very candidly that we knew nothing about the chemical properties of Tris, and that we had no way of evaluating possible health hazards. Our only purpose was to try to impress upon the Commission what would happen to our industry if the Commission issued a ban under the Federal Harzardous Substances Act.

On April 7, 1977 the CPSC issued its ban and our industry was faced with the prospect of having to repurchase all unwashed garments containing Tris, whether in the hands of consumers or on the retailers' shelves. On April 13, 1977 the Commission compounded this blow by stating that the children's sleepwear manufacturer was the only manufacturer who was required to repurchase Tris garments, and that our small industry should bear the entire brunt of repurchase. The unfairness of

this interpretation was driven home to us by the fact that we had neither put Tris in the fabric in the first place nor specified its use.

In May 1977, after AAMA had filed suit on behalf of its membership in the District Court for the District of Columbia, Judge Hart found that the CPSC had acted arbitrarily and capriciously, and ordered the Commission to redefine the banned product so that the repurchase responsibility under the Federal Hazardous Substances Act would be broadened. The Commisssion then averted the need to comply with the Court's order by reissuing its ban so as to include the Tris manufacturer, the fiber, yarn and textile manfacturers, as well as the other segments of the children's sleepwear industry. Later that same month, however, Springs Mills, a textile manfacturer, sued the CPSC in the District Court of the District of South Carolina with the result that the entire ban was overturned.

Despite the decision of the South Carolina Court in the Springs Mills case, the Commission issued a "Statement of Policy" in December of 1977 stating that while they could not ban Tris by regulation, they still believed that Tris was hazardous and that they would therefore seek to block the sale of Tris garments in federal district courts throughout the country. The results, of course, has been a de facto ban, and we, the apparel manufacturers, are again the losers. We have reinbursed our retail customers who have sent back the Tris garments which they purchased from us, and yet we have no effective recourse against our suppliers. As a result, the entire loss falls on us.

And what has the impact been our industry? A few of us have suffered bankruptcy, while others have simply locked their doors. Some have shifted completely and now manufacture other apparel products, while others continue to exist because of the confidence of their creditors, or through the temporary expedient of SBA loans. For most of us, however, we continue to survive because we believe that the many inequities imposed on us since April 7, 1977 will eventually be recognized and that, through your actions, we will be given the compensation we still so desperately need, and so properly deserve.

One of the best indications of the need for this legislation is the letter of April 27, 1978 to the House Committee on the Judiciary Chairman Rodino from the five Commissioners of the CPSC. The Commissioners stated that they supported this legislation, and that our industry has been economically harmed through no fault of our own. Furthermore, we agreed with the Commissioners that this legislation should consider the various circumstances surrounding the use of Tris. These recommendations were incorporated into this legislation which enables the Court of Claims to consider these small manfacturers claims on an individual basis.

We believe the issue under consideration today is the consequence of the action taken by the Consumer Product Safety Commission on April 7, 1977 and the continuing inequity illustrated by the impact on the small children's sleepwear manfacturers and their employees in small towns throughout our country.

There have been many events since the CPSC's ban action on April 7, 1977. These include numerous proclamations of various sorts by the CPSC, a multiplicity of federal district and appeals court decisions and arbitration among business partners. None have resolved the initial inequities and it is now more apparent than ever that the sole remedy lies in your anticipated action.

We appreciate this opportunity to appear before the Committee, your interest in our continuing plight and your efforts to correct this wrong.

We will be pleased to respond to any questions you may wish to ask.

Senator EAST. Senator Baucus, if you have no objection, I thought we would let Mr. Marchant speak.

Please proceed, Mr. Marchant.

Mr. MARCHANT. Mr. Chairman and Senator Baucus, I would like to open my remarks by saying happy birthday to you one day early since tomorrow is your birthday. I hope that will get us off on the right foot.

Senator EAST. Thank you.

Mr. MARCHANT. Before I get into my formal discussion today concerning Tris, I think it is important to note that some very significant changes have occurred since the Tris controversy evolved during the 1970's.

At the beginning of this new decade, the entire course of government is changing. This is happening here in Washington and in State capitals all across the Nation. The people have recognized

that excesses of government have occurred, both by Government initiating expensive new programs and by Government conducting operations that unnecessarily interfere with the operations of private enterprise.

Elected officials across this country have responded to this public perception by cutting back agency budgets, such as the CPSC, under consideration at this time, and telling the bureaucrats that they need to be less actively involved in our lives.

So the public knew that the bureaucracies were being overzealous and have recognized that and taken action. Solid proof of this change from the 1970's can be found in the election of President Reagan. Mr. Reagan ran on a platform that was based on less Government interference in our lives. He knew the bureaucrats had been overzealous in the late 1960's and 1970's and he said so. He said things had to change, and the American people clearly agreed by electing him President.

The Government involvement in the Tris case is a prime example of the type of actions by the agency officials that President Reagan so often and so long has criticized. The result is that millions of dollars of damages to private industry have been caused by nothing more than overzealous and contradictory bureaucratic activities, just as Mr. Reagan and many others have been saying for many years.

Times have changed. We have recognized that and acted accordingly. But the problem is that many have already been hurt, and that is why I am here.

I am seeking to gain passage of the Tris legislation, S. 823, which will allow some redress for those who have been wrongfully hurt by the Government in the case of Tris.

That is what the legislation before you today is all about. We are not seeking a bailout. We are seeking only the right to have our cases heard before the U.S. Court of Claims and decided on their merits.

Gentlemen, what can be more fair and equitable than that?

If I may, let me briefly describe the history of our firm.

Stone Manufacturing Co. had its beginning in Greenville, S.C., on July 9, 1933, then a small Southern town but now universally described as the textile center of the world.

Imagination, determination, and enterprise were the benchmarks of our founder, Eugene E. Stone III, who is still actively involved on a daily basis serving as chairman of the board. Mrs. Stone, his wife, acts as coordinator for the design departments, while their two sons, Rivers and Jack, serve as president and executive vice president, respectively.

They started with eight employees and five sewing machines. Stone Manufacturing Co. payroll now includes over 3,400 people in three States.

From a manufacturing beginning in the loft of an industrial building in downtown Greenville, S.C., producing ladies' bloomers, to a line of merchandise that now includes children's sportswear, ladies' and children's lingerie, ladies' and children's sleepwear, men's woven underwear, and men's athletic wear, Stone Manufacturing Co. has been a trendsetter.

A significant factor in the company's continuing growth is the very unusual approach to design, reflecting advanced technology and the broad and varied experience of the managerial team.

All garments are designed for accelerated quality production within the capabilities of the machines and stitchers producing them, assuring favorable profit margins for retailers on the top quality items they produce.

At this point, Mr. Chairman, it is important to note that the record reflect accurately the CPM, or what we term the "Critical Path Movement" of standards for the flammability of children's sleepwear as Stone Manufacturing Co. knew it then and knows it today.

1. The Flammable Fabrics Act, which we will later define as FFA, was given congressional approval June 30, 1953, and amended June 23, 1954, and again December 14, 1967.

This act prohibited the introduction or movement in interstate commerce of fabrics and articles of wearing apparel which are so highly flammable as to be dangerous when worn by individuals.

2. The determination of so highly flammable was made through a fabric burn test using U.S. Department of Commerce commercial standard C-5191-53.

The revision in 1967 to the FFA permitted the Secretary of Commerce to promulgate standards to protect the public against unreasonable risk of occurrence of fire, resulting in death or personal injury, based on the investigations of research.

4. January 24, 1970, Maurice H. Stans, the Secretary of Commerce, issued a finding of possible need for the flammability standard for children's sleepwear.

5. Again, in February 1970, Myron Tribus, the Assistant Secretary of Commerce, speaking before the American Society for Quality Control, Textile and Needle Trades Division, stated that the Department of Commerce was concerned that U.S. industry not be damaged or penalized by being forced into a protection program economically unsound.

6. In October of 1970, Stone Manufacturing Co. appointed Vice President of Manufacturing Thomas M. Mitchell to represent our firm on the American Apparel Manufacturers Association (AAMA), apparel flammability committee. A blend of interests were included. The U.S. Government makeup was 23 percent; textile, fiber, and thread makeup was 31 percent; the apparel industry made up 42 percent; and retailing made up 4 percent.

I think it is significant to note that close Government, resource, manufacturing, and retailing associations were evident at the very outset.

7. In November of 1970, Maurice H. Stans, Secretary of Commerce, issued at that time the proposed standards for the flammability of children's sleepwear, sizes 0 through 6x.

8. In January of 1971, the AAMA testified before the Department of Commerce:

> At the present time the industry is not sure that there is a fabric in existence that will pass the proposed test and still provide a totally acceptable product for the public.

9. On July 29, 1971, the Secretary of Commerce issued the standard for the flammability of children's sleepwear.

10. On October 19—which is my birthdate, Senator—1971, John Reeves, president of the American Textile Manufacturers Institute and chairman of Reeves Brothers Textiles, said: "As of today, there is no way to make a totally flame-resistant garment that people will buy and wear."

This indicates that there was trouble in the industry trying to come up with a standard.

He said that despite the fact that textile and chemical companies are spending $20 million a year to solve the flame retardation problem, no solution was in sight.

11. On November 4, 1971, Alan Polansky, Deputy Director of the Office of Textiles of the Department of Commerce, admitted:

> In the last few weeks, the Department of Commerce realized it may not have taken everything into account and called upon the entire industry to submit any data that might be pertinent or helpful. In theory, the Commerce Department not only can but must change any portion of a standard that has proven unworkable or without merit.

12. On January 17, 1972, manufacturers and retailers of children's sleepwear are showing increasing strength in the support of Sears, Roebuck's stand on the Department of Commerce flammability standard: "The chain may have to abandon the children's sleepwear category if the current standard is to be enforced."

13. Stone Manufacturing Co. elected to skip the 1972 fall children's sleepwear season. Production must meet the new Government standard; the fabric was unknown; no tolerances in its sampling plan were allowed by the Government.

In other words, they said that the definition must be final. There was no plus factor nor was there a minus factor.

14. In the spring of 1972, Springs Mills' sales representatives presented to Stone Manufacturing Co. the first acceptable product for flame retardant children's sleepwear.

It was a 100-percent polyester woven batiste fabric with a flame-resistant finish. The finish to us was unknown, and it was not disclosed by the supplier.

15. On July 21, 1972, just days before the standard was to go into effect, the Commerce Department then did issue a sampling plan—apparel industry's first knowledge of what performance criteria was to come.

16. Stone Manufacturing Co. decides to enter the flame-retardant children's sleepwear market with Springs Mills' new fabric for the 1973 spring season.

16. Stone Manufacturing Co. orders in-house laboratory equipment for performing all required Government tests.

We wanted to have our own operation, so as to attest to the flame retardancy of any fabrics that we purchased.

18. October of 1972, Congress passes the CPSC act. Responsibility then was transferred from Commerce to CPSC for flame retardancy and the administration of the FFA.

19. In the fall of 1972 through March of 1976, Stone Manufacturing Co. successfully produced children's flame-retardant sleepwear using fabrics from the Nation's leading textile manufacturers, many of whom are in our part of the country.

20. On March 24, 1976, CBS newsman, Walter Cronkite, on the evening news provides the first information on Tris. It was then a

hereto unknown term by those of us who are apparel manufacturers.

21. April 1, 1976, after the Cronkite story, Springs Mills provides assurance on Tris-treated fabric, and I quote:

> Springs Mills tests all new fabric finishes before they are used commercially. We perform dermatological tests and wear tests on our fabrics before we begin production on these materials. Our tests have demonstrated that the fabrics are safe for any apparel use.

22. On April 14, 1976, Michigan Chemical Co., a leading producer of what we now know to be Tris, indicated in written communication to apparel manufacturers:

> Tris, a flame-retardant additive for textiles, including children's sleepwear, presents no known hazard to the consumer when properly applied.

Again, the apparel industry was simply going on orders that had been given by the Government.

23. June 25, 1976, Stone Manufacturing Co. begins to search for alternative fabrics for the spring of 1977 line. Almost 1 full year before the ban went into effect, Stone Manufacturing Co. is on the firing line seeking a solution to the problem. Free enterprise was working.

24. On April 7, 1977, almost a year later, the CPSC bans apparel containing Tris and later restricts exports.

Gentlemen, we have had two plant closings since the passage of Tris legislation, one in Lake Lure, N.C., and one in Asheville, N.C., both which were manufacturing and producing children's sleepwear products, and both of which were injured as a result of the ban.

At that time, we were gearing for a 300-plus employee per plant contingency in the work force and subsequently we now have taken out what would have been 600 people from the work force in the State of North Carolina.

You have my formal statement before you on the Tris matter.

I would like to indicate that we have successfully put this measure before you gentlemen in the past. It has been acted on affirmatively. The companion legislation, as you referred to earlier, H.R. 161, is pending in the House. It has been referred to the House Judiciary Committee.

Finally, I would like to say that this legislation does not authorize any payment of funds. It only gives the court of claims jurisdiction to hear these claims on their merits.

As I indicated earlier, the Reagan Administration has consistently supported efforts to reduce the harmful effects on business and industry of overregulation by agencies like the CPSC.

This legislation, S. 823, embodies the very essence of this philosophy by providing a mechanism to correct past wrongs.

The CPSC reminds me, Senator, of an agency which has gone to war, watching the battle from atop a lofty bureaucratic perch, and then descending after its conclusion to shoot the wounded, no matter which side the injured or wounded were on.

Stone Manufacturing Co. and the apparel industry have been wounded. It is now time for you gentlemen to provide us that avenue that we seek, the corrective prescriptive and favorable consideration of S. 823.

Your support is respectfully requested for this most important and needed legislation.

[The prepared statement, OMB revision statement, and case history of Tris, supplied by Mr. Marchant, follow:]

PREPARED STATEMENT OF THOMAS M. MARCHANT III

Mr. Chairman, before I get into my formal discussion today concerning Tris, I think it is important to note that some very significant changes have occurred since the Tris controversy evolved during the 1970's.

At the beginning of this new decade the entire course of government is changing. This is happening here in Washington and in State capitols all across the Nation. The people have recognized that excesses of government have occurred, both by government initiating expensive new programs and by government conducting operations that unnecessarily interfere with the operations of private enterprise. Elected officals across this country have responded to this public perception by cutting back agency budgets and telling the bureaucrats that they need to be less actively involved in our lives. So the public knew the bureaucracies were being overzealous, and we have recognized that and taken action.

Solid proof of this change from the 1970's can be found in the election of President Reagan. Mr. Reagan ran on a platform that was based on less government interference in our lives. He knew the bureaucrats had been overzealous in the late 60's and 70's, and he said so. He said things had to change. And the American people clearly agreed by electing him President.

The government involvement in the TRIS case is a prime example of the type of actions by the agency officials that President Reagan has criticized. And the result—millions of dollars of damages to private industry—has been caused by nothing more than overzealous and contradictory bureaucratic activities, just as Mr. Reagan and others have been saying for years.

So, times have changed. We have recognized that and acted accordingly. But the problem is that many have already been hurt, that's why I'm here—I am seeking to gain passage of legislation (S. 873) which will allow some redress for those who have been wrongfully hurt by the government in the case of TRIS.

That's what this legislation is all about. We are not seeking a bail-out. We are seeking only the right to have our cases heard before the U.S. Court of Claims and decided on their merits. What can be more fair or equitable than what?

If I may, let me very briefly describe the history of our firm.

Stone Manufacturing Company had its beginnings in Greenville, South Carolina, on July 9, 1933, then a small southern town but now universally described as the "Textile Center of the World". Imagination, determination and enterprise were the benchmarks of Eugene E. Stone III, our company's founder and now still actively involved on a daily basis, serving as chairman of the board. Mrs. Stone acts as coordinator for the design departments while their two sons, Rivers and Jack, serve as president and executive vice president respectively. Starting with eight employees and five sewing machines, Stone Manufacturing Company's payroll includes over 3,400 people in three states.

From a manufacturing beginning in the loft of an industrial building in downtown Greenville producing ladies "Bloomers" to a line of merchandise that now includes children's sportswear, ladies and children's lingerie, ladies and children's sleepwear, men's woven underwear and men's athletic wear, Stone has been a "Trend-Setter".

A significant factor in the company's continuing growth is the unusual approach to design reflecting advanced technology and the broad and varied experience of the managerial team. All garments are designed for accelerated quality production within the capabilities of the machines and stitchers producing them, assuring favorable profit margins for retailers on the top quality items they produce.

At this point, Mr. Chairman, it is important that the record reflect accurately the CPM or "Critical Path Movement" of standards for the flammability of children's sleepwear as Stome Manufacturing knew it then and knows it today.

1. The Flammable Fabrics Act (FFA) was given Congressional approval June 30, 1953; amended August 23, 1954 and December 14, 1967. This Act prohibited the introduction or movement in interstate commerce of fabrics and articles of wearing apparel which are "so highly flammable" as to be dangerous when worn by individuals.

2. The determination of "so highly flammable" was to be made through a fabric burn test using United States Department of Commerce commercial standard C5191-53.

3. The revision in 1967 to the FFA permitted the Secretary of Commerce to promulgate standards "to protect the public against unreasonable risk of the occurrence of fire resulting in death or personal injury" based on the investigations of research.

4. January 24, 1970—Maurice H. Stans, Secretary of Commerce, issues a finding of possible need for the flammability standard for children's sleepwear.

5. February 1970—Myron Tribus, Assistant Secretary of Commerce, speaking before the American Society for Quality Control, Textile and Needle Trades Division, stated that the Department of Commerce was concerned that U.S. industry not be damaged or penalized by being forced into a protection program economically unsound.

6. In October 1970, Stone Manufacturing Company appointed vice president of manufacturing Thomas M. Mitchell to represent the firm on the American Apparel Manufacturers Association (AAMA) Apparel Flammability Committee. (A blend of interests were included: U.S. Government 23 percent; Textile, Fiber & Thread 31 percent; Apparel 42 percent and Retail 4 percent.) Close government, resource, manufacturing and retailing associations were evident at the outset.

7. November 1970, Maurice H. Stans, Secretary of Commerce issues proposed standards for the flammability for childrens sleepwear in sizes 0-6X.

8. January 1971, American Apparel Manufacturers Association (AAMA) testifies before the Department of Commerce:

". . . at the present time the industry is not sure that there is a fabric in existence that will pass the proposed test and still provide a totally acceptable product for the public (i.e. merchantable)."

9. July 29, 1971, Secretary of Commerce issues standard for the flammability of childrens sleepwear.

10. October 19, 1971, John Reeves, president of the American Textile Manufacturers Institute and chairman of Reeves Brothers Textiles, says, "as of today there is no way to make a totally flame-resistant garment that people will buy and wear." He said that despite the fact that textile and chemical companies are spending $20 million a year to solve the flame retardation problem, no solution is in sight.

11. November 4, 1971, Alan Polansky, Deputy Director of the Office of Textiles of the Department of Commerce admitted "that in the last few weeks the Commerce Department realized that it may not have taken everything into account" and has called upon the entire industry to submit any data that might be pertinent or helpful. In theory the Commerce Department not only 'can' but 'must' change any portion of a standard that is proven unworkable or without merit.

12. January 17, 1972, manufacturers and retailers of childrens sleepwear are showing increasing strength in support of Sears Roebuck's stand on the Department of Commerce flammability standard . . . "the chain may have to abandon the childrens sleepwear category if the current standard is to be enforced."

13. Stone Manufacturing Company elects to skip the 1972 fall childrens sleepwear season. Production must meet new government standard—fabric unknown, no tolerances in sampling plan allowed by government.

14. Spring 1972, Spring Mills sales representatives present Stone Manufacturing with first acceptable product for flame retardant childrens sleepwear (product was 100 percent polyester woven batiste fabric with a flame retardant finish . . . finish unknown, not disclosed by supplier).

15. July 21, 1972, just days before the standard goes into effect. Commerce issues a 'sampling plan'. Apparel industry's first knowledge of what performance criteria to expect.

16. Stone Manufacturing Company decides to enter flame retardant childrens sleepwear market with Springs Mills' new fabric for 1973 spring season.

17. Stone orders 'in-house' laboratory equipment for performing all required government tests. Establishes written procedures and sends technicians to National Bureau of Standards to school in proper testing technique (Stone taking initiative).

18. October 1972, Congress passes Consumer Product Safety Commission Act. Responsibilities for Flammable Fabrics Act transferred from Department of Commerce to CPSC.

19. Fall 1972—March 1976, Stone Manufacturing successfully produced childrens flame retardant sleepwear using fabrics from the Nation's leading textile manufacturers.

20. March 24, 1976, CBS Newsman Walter Cronkite on evening news provides first information on Tris—a hereto unknown term by apparel manufacturers.

21. April 1, 1976, Springs Mills provides assurance on Tris treated fabric, "Spring Mills tests all new fabric finishes before they are used commercially. We performed dermatological tests and wear tests on our firefoe (R) fabrics before we began

production on these materials. Our tests have demonstrated that the fabrics are safe for any apparel use."

22. April 14, 1976, Michigan Chemical, a leading producer of Tris, indicated in written communication to apparel manfacturers "Tris, a flame retardant additive for textiles, including childrens sleepwear, presents no known hazard to the consumer when properly applied".

23. June 25, 1976, Stone Manufacturing Company begins search for alternate fabric for spring 1977 season. Almost 1 full year prior to ban.

24. April 7, 1977, CPSC bans apparel containing Tris, later restricts exports.

Tris (formally named 2,3-dibromopropyl phosphate) in a flame-retardant chemical used mainly in children's sleepwear. The need for such a chemical can be traced to 1967 when Congress called for something to be done about the damage to young children from flammable fabrics.

In 1972, the Department of Commerce set mandatory standards to lessen the flammable nature of children's sleepwear. Tris was the only flame retardant available that met these standards.

In 1976, the Environmental Defense Fund (EDF) petitioned the Consumer Product Safety Commission (CPSC) to put warning labels on all Tris-treated garments. The petition was based on preliminary tests indicating that the chemical may have carcinogenic potential.

However, on February 8, 1977, the EDF requested that the CPSC ban the sale of all children's sleepwear containing the flame-retardant substance. Two years of research by the National Cancer Institute demonstrated that Tris was a cancer-causing agent in mice and rats.

Because of this evidence, the CPSC, on April 8, 1977, banned the production and further sale of Tris-treated products. The ban meant that manufacturers had to repurchase from retailers any children's clothing manufactured of cloth treated with this by the textile mills.

An important fact that should be noted is the nature of CPSC's action—an immediate ban on further production and sale of Tris-treated products. This is significantly different from other actions by the Federal Government, such as requiring warning labels on hair dye or phasing out the use of cyclamates. The Tris ban, which was inconsistent with prior Government actions, meant large sums of monies were tried up on apparel products and materials that could not be sold, but could only be stored.

Springs Mills, Inc. brought legal action against the CPSC and, after a May 24, 1977, hearing, U.S. District Judge Robert T. F. Chapman issued a temporary injunction preventing the CPSC from enforcing its Tris regulations against Springs Mills. The trial, which was held on June 13, 1977, resulted in Judge Chapman's decision striking down the CPSC ban against Tris.

An important finding of fact by Chapman concerned the original flammability standards issued by the Department of Commerce. According to Chapman, when the order to comply with the standards was issued, "Tris was the only flame retardant available to effectively treat polyester, acetate, and triacetate fabrics used for children's sleepwear, which would enable the sleepwear to comply with the Secretary's standards." According to the Court, "This had the practical effect of the Federal Government ordering that Tris be used." "Now another department of the same Government has not only banned Tris, but ordered the repurchase of articles containing it."

Judge Chapman also charged that CPSC had neither followed the procedural safeguards which Congress has established nor afforded the parties opportunities for a full rule-making hearing. In short, he concluded that due process had been denied in this Tris affair.

Shortly after Chapman's decision, the U.S. Court of Appeals refused to reinstate the ban, but in so doing it stated that the Chapman ruling could not prevent the CPSC from taking other actions to restrain sales of Tris-treated apparel. The Appeals Court said that the Commission could begin seizure actions against individual retailers, which would require Court action for each case.

In 1978, the controversy was carried even further. On May 5, a majority of the CPSC held that the CPSC had the authority to prohibit exportation of Tris-treated products which were believed to be hazardous. This decision (which represented a sharp reversal of prior CPSC export policy that was established in 1975, reaffirmed in 1976 and formally approved by a vote on October 10, 1977) was made over a vigorous dissent of Chairman S. John Byington and Commissioner Barbara H. Franklin. The major basis for their dissent is the fact that section 5(b)(3) and 6(a) of the Federal Hazardous Substance Act specifically exempt from CPSC seizure authority exports that are properly labeled and marked for export.

In January 1978, the U.S. Senate unanimously passed a bill (S. 1503) to aid over 100 companies in their $150 million loss resulting from the Commission's actions. The bill would have given the U.S. Court of Claims jurisdiction to hear arguments by manufacturers, producers, distributors, and retailers and to determine the amounts of loss. Furthermore, the U.S. House of Representatives passed this bill in October 1978, by a roll call vote of 304 to 90. Despite considerable support of this bill, President Carter, in November 1978, "Pocket Vetoed" the reimbursement proposal.

Legislation was introduced again last session to relieve the problem (S. 521 and H.R. 768). S. 521, which was approved unanimously by the Senate Judiciary Committee, was passed by a unanimous vote in the Senate on December 20, 1979. S. 521 did not make it out of the House Committee.

Bills which are identical to S. 521 have been introduced in this session of Congress. S. 823, which is currently in the Senate Judiciary Committee, was introduced by Senators Thurmond, Kennedy, Harry Byrd, Hollings, Warner, Helms, Heflin, Denton and East. Congressman Carroll Campbell has introduced similar legislation in the House as H.R. 161, which is currently in the Administrative Law Subcommittee of the House Judiciary Committee.

As was argued on the Senate floor last year, an important point that should be noted about this series of legislation is that it does not represent a bail-out. This legislation simply confers jurisdiction on the U.S. Court of Claims to hear claims by those who incurred losses because of the Tris Ban.

This legislation tightens up earlier legislative proposals and places a number of limitations on the claims that may be filed. With these limitations, it is estimated by the Congressional Budget Office that the potential cost to the government may now be around $40 million, which is substantially below the original estimate of $150 million.

Finally, the legislation does not authorize any payment of funds—it only gives the Court of Claims jurisdiction to hear these claims on their merits.

As I indicated earlier, the Reagan Administration has consistently supported efforts to reduce the harmful effects on business and industry of over-regulation by agencies like the Consumer Product Safety Commission. This legislation (S. 823) embodies the very essence of this philosophy by providing a mechanism to correct past wrongs.

The Consumer Products Safety Commission reminds me of an agency who has gone to war, watching the battle from atop a lofty bureaucratic perch and then descending after it's conclusion to 'shoot the wounded', no matter which side they were on. Stone Manufacturing Company and the apparel industry have been wounded. It's now time for you gentlemen to provide us with the 'corrective' prescription . . . favorable consideration of S. 823.

Your support is respectfully requested for this most important legislation.

Fiscal Year 1982 Budget Revisions—Additional Details on Budget Savings, April 1981

Executive Office of the President, Office of Management and Budget

PROGRAM DESCRIPTION

CPSC identifies unreasonable hazards associated with consumer products and seeks to control them through education of consumers, obtaining voluntary changes in production by manufacturers or, when necessary, promulgation and enforcement of rules regulating or banning hazardous products.

PROPOSED CHANGES

Budget authority and outlays are proposed to be decreased by $2 million in 1981 and $12 million in 1982 through selected reductions in field activities, modifying the hospital-based acute injury surveillance systems, limiting expansion in chronic chemical hazard regulation, restricting compliance and enforcement activities, and increasing efficiency of organization.

Rationale

By cutting back lower-priority activities, this proposal would impose needed fiscal restraint, without jeopardizing the agency's statutory mission., CPSC's success in recent years in controlling the most important acute hazards has lessened the need for expensive surveillance activities. Success in achieving voluntary industry compliance and improved cooperation with State and local consumer protection agencies

means enforcement activities can be limited. Unanswered questions about the human health impact of chronic chemical exposure indicate a need for more research, not more regulation, in this area.

KEY FACTS ABOUT THE PROGRAM

Increased funding will be provided for the HHS National Toxicology Program.

Interagency regulatory coordination for toxic chemicals is provided by the Interagency Regulatory Liaison Group.

CONSUMER PRODUCT SAFETY COMMISSION

[In millions of dollars]

Funding	1981	1982	1983	1984	1985	1986
Carter budget:						
Budget authority	44	45	45	45	45	45
Outlays	44	47	45	45	45	45
Reestimate and adjustment:						
Budget authority						
Outlays						
Program changes:						
Budget authority	−2	−12	−12	−12	−12	−12
Outlays	−2	−12	−12	−12	−12	−12
Reagan budget:						
Budget authority	42	33	33	33	33	33
Outlays	42	35	33	33	33	33

A Case History of Tris

Tris (formally named 2, 3-Dibromoproply phosphate) is a flame-retardant chemical used mainly in children's sleepwear. The need for such a chemical can be traced to 1967 when Congress called for something to be done about the damage to young children from flammable fabrics.

In 1972, the Department of Commerce set mandatory standards to lessen the flammable nature of children's sleepwear. Tris was the only flame retardant available that met these standards.

In 1976, the Environmental Defense Fund (EDF) petitioned the Consumer Product Safety Commission (CPSC) to put warning labels on all Tris-treated garments. The petition was based on preliminary tests indicating that the chemical may have carcinogenic potential.

However, on February 8, 1977, the EDF requested that the CPSC ban the sale of all children's sleepwear containing the flame-retardant substance. Two years of research by the National Cancer Institute demonstrated that Tris was a cancer causing agent in mice and rats.

Because of the evidence, the CPSC, on April 8, 1977, banned the production and further sale of Tris-treated products. The ban meant that manufacturers had to repurchase from retailers and children's clothing manufactured of cloth treated with Tris by the textile mills.

An important fact that should be noted is the nature of CPSC's action—an immediate ban on further production and sale of Tris-treated products. This is significantly different from other actions by the Federal Government, such as requiring warning labels on hair dye or phasing out the use of cyclamates. The Tris ban, which was inconsistent with prior Government actions, meant large sums of monies were tied up on apparel products and materials that could not be sold, but could only be stored.

Springs Mills, Inc. brought legal action against the CPSC and, after a May 24, 1977, hearing, U.S. District Judge Robert F. Chapman issued a temporary injunction preventing the CPSC from enforcing its Tris regulations against Springs Mills. The trial, which was held on June 13, 1977, resulted in Judge Chapman's decision striking down the CPSC ban against Tris.

An important finding of fact by Chapman concerned the original flammability standards issued by the Department of Commerce. According to Chapman, when the order to comply with the standards was issued, "Tris was the only flame retardent available to effectively treat polyester, acetate, and tri-acetate fabrics used for children's sleepwear, which would enable the sleepwear to comply with the secre-

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In 1978, the controversy was carried even further. On May 5, a majority of the CPSC held that the CPSC had the authority to prohibit exportation of Tris-treated products which were believed to be hazardous. This decision (which represented a sharp reversal of prior CPSC export policy that was established in 1975, reaffirmed in 1976 and formally approved by a vote on October 10, 1977) was made over a vigorous dissent of Chairman S. John Byington and Commissioner Barbara H. Franklin. The major basis for their dessent is the fact that sections 5(b)(3) and 6(a) of the Federal Hazardous Substance Act specifically exempt from CPSC seizure authority exports that are properly labeled and marked for export.

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As was argued on the Senate floor last year, an important point that should be noted about this series of legislation is that it does not represent a bail-out. This legislation simply confers jurisdiction on the U.S. Court of Claims to hear claims by those who incurred losses because of the Tris ban.

This legislation tightens up earlier legislative proposals and places a number of limitations on the claims that may be filed. With these limitations, it is estimated by the Congressional Budget Office that the potential cost to the Government may now be around $40 million, which is substantially below the original estimate of $150 million.

Finally, the legislation does not authorize any payment of funds—it only gives the Court of Claims jurisdiction to hear these claims on their merits.

Senator EAST. Thank you, Mr. Marchant.

If I could just summarize quickly as I see it and to ask one point to satisfy myself for the record, then I will ask Senator Baucus to pick up the loose ends.

As I understand both of you then—and this is not to belabor the obvious—you are both indicating that one Government entity told you to do one thing, which you did, and a subsequent Government entity said to stop doing it. That left you in a most vulnerable position of all the parties involved.

You have the fabric manufacturer and then you have you people in the apparel end of it. You have obviously got the retailer, and you have the purchaser. The one who was clearly left with the

burden of bearing this economic problem were you people who were the apparel manufacturers.

You are certainly contending that you are left in this very awkward position. Awkward may be too charitable a way of putting it, but you are left with the economic loss, not of your making or anticipation in any way, shape, or form.

Hence, you see no contributing negligence, if you will, on your part.

You are left with the problem. Then you have to begin to look for remedies.

As you and your businesses and your legal counsel begin to survey the landscape for where you might find remedies for your loss, in fact there are none. You do not have a course of action against the textile companies, who I presume if you did would simply then revert back to us.

You obviously have no cause of action against retailers or against consumers who are simply backing it up to you.

It comes back that you have no workable legal remedy at this point, except the potential of one against the Federal Government, which you contend originally started the problem.

What you are asking for is the opportunity to take your case to the Court of Claims.

Mr. SHIREY. That's correct.

Senator EAST. You are not including profit or attorney fees here. As I understand it, you are simply looking for some way to recover a loss that was clearly imposed upon you.

Is that about where we are with it as you gentlemen see it?

Mr. SHIREY. Yes; that's correct, Senator.

Senator EAST. I have no further questions.

Senator Baucus?

Senator BAUCUS. I have several questions and I don't know which of the three of you to ask.

I will ask the question generally and anyone may answer.

The heart of the matter, as I see it, is the degree to which Government should indemnify a private person for some action the Government takes. That is a very broad, general phrasing of the question.

More specifically, I suppose, would be the degree to which the Federal Government should indemnify manufacturers or businesses that manufacture products that are in one way or the other regulated by the Federal Government.

Certainly, drug manufacturers are regulated by the FDA and other Federal agencies. I suppose the apparel industry is regulated by similar agencies but not to the same degree as the drug industry.

The real question it seems to me is the degree to which a manufacturer producing a regulated product should be indemnified when the Government decides that a certain product should be banned.

There aren't a lot of cases where that has happened, but I think it is a fairly fundamental question. If this legislation is passed, it is going to set some precedents in the general area.

We all know that cyclamates have been banned. We also know that cyclamate manufacturers have suffered losses. It is my under-

standing that there has not been legislation which indemnifies cyclamate manufacturers.

That was a product Government felt created such a high possibility of harm to the American public that it was not worth taking the risk. Therefore, Government decided that the product should not be sold.

As we all know, cyclamate manufacturers did want some compensation and some indemnification. At least to my understanding, that was denied.

We have here another instance where the CPSC took an action which caused damage to the apparel industry. The question is the degree to which the Congress should take a contrary view to the cyclamate position and provide indemnification for the industry.

It is a vexing question. I personally tend to think when one enters a field that is regulated, one is on notice that the Government might take an action which might be financially disadvantageous.

My question to you gentlemen is to what degree should private industry be indemnified for regulatory actions taken by the Government.

If this bill does pass it will set a significant precedent.

Mr. MARCHANT. Senator, let me respond to that and then Fred Shippee of the AAMA would like to elaborate on it.

The knowledge that I have of the subject would bring me to the point that cyclamates were allowed to be phased out over a period of time, whereas the Tris ban was April 7, 1977, and the door was slammed.

Other Federal agencies required warning labels be put on hair dye, for instance. We were not allowed even that opportunity.

In the Judge Chapman decision in U.S. district court, he charged that the CPSC had neither followed the procedural safeguards which Congress itself had established nor afforded the injured parties opportunities for a full rulemaking hearing. In short, he concluded that due process had been denied in the Tris affair.

Senator BAUCUS. In your view, should the American farmers—the wheat and feed grain producers—be compensated for the losses they incurred because of the grain embargo the Government announced?

Mr. MARCHANT. I think if you would look to that issue, it might be somewhat different in that there are certain subsidies in that industry that the apparel industry does not enjoy.

Senator BAUCUS. They weren't able to take advantage of any subsidies. Let's take the price support, for example. The price fell and didn't go below the price support or target price.

The wheat farmers suffered a loss when the U.S. Government enacted the grain embargo.

Arguably, they have a greater claim of action because Government action has nothing to do with them. They are just farmers who grow wheat. Wheat is not a potentially harmful product.

Why shouldn't Uncle Sam compensate wheat farmers?

Mr. MARCHANT. From a personal standpoint, our case is somewhat distinct from that.

If the Federal agency involved—no matter which industry is affected, is injured as a result of a Federal edict or mandate by

setting the standard and then, in my opinion, arbitrarily withdrawing it without allowing for a rulemaking hearing or a phasing out or a warning labeling of that particular item——

Senator BAUCUS. This is a perfect example too, because of all the campaign promises of both Presidential candidates who announced they would not favor the embargo. The farmers didn't have a hearing. Suddenly there was an embargo.

Let's take a drug manufacturer. Let's say the drug manufacturer is selling birth control pills. Are you saying that after marketing this drug and the FDA decides to take it off the market, that the pharmaceuticals should have a similar bill passed?

Mr. SHIPPEE. I would hope that if those particular manufacturers you refer to felt they had been unjustly treated, they would have the same opportunity we are having to come before the Congress of the United States and depend upon your wisdom as to whether they had been treated inequitably or not.

The issue we are dealing with, Tris, has been before both Houses of this Congress. When it went before both Houses, those Houses themselves decided that we had been treated on an inequitable basis.

The Court of Claims should now determine the extent to which we would be indemnified.

This is distinct from the cyclamate case. The cyclamate people came before the Congress of the United States with the support of the Justice Department which favored indemnification legislation for the cyclamate people.

The Congress decided that they were not entitled to it. I think that is where the decision should lie in these borderline cases.

Senator BAUCUS. This gets kind of confusing, unfortunately, because, as you know, the Justice Department has revoked that earlier endorsement of cyclamates. The Justice Department has said previously in its testimony on this bill that it was in error and should not have endorsed indemnification.

The Justice Department is opposed to the previous bills. We don't have a current view from the Justice Department. We are asking the administration for its view on this bill, and the administration is mute. They have not responded.

The position of the Justice Department, and certainly the Carter administration, was in opposition to this bill, President Carter vetoed the bill.

So the history of legislation thing gets pretty complicated.

Mr. SHIREY. I would not presume to respond to either the agricultural or pharmaceutical issues which you raised, because I have no expertise at all there. However, I would respond a bit further to some of the issues you have presented.

First, you have indicated that those who consider going into a regulated field should be put on notice upon their entry that there is the possibility for further Government action.

So far as I know, in every single case that there was a children's sleepwear manufacturer covered by the ban or affected by the standards, they were already in business producing these products prior to the children's sleepwear standard and the ban that later followed on Tris.

As a matter of fact, because of the standard, when it was initially promulgated by the Department of Commerce, there were a large number of marginal producers of children's sleepwear who dropped out. They said: It is too big a hassle. It is a small part of our total product mix, and we simply won't fool with it.

So, yes, those who could drop out in most cases did drop out. For those of us who remained, it was such a significant part—if not a total share—of our product mix that we could not drop out.

It was not that we entered after the standard was put there and should have been put on notice, but it was that we were already there and the Government brought the standard to us.

In response to, maybe, a comparison between us and the pharmaceuticals—although I don't know that much about pharmaceuticals—at the time the standard was considered it was viewed, I think, by everyone concerned as a very stringent performance standard.

There were two parts to the standard. One was a burn-out criterion and the other was a drip criterion. Immediately after the Tris fiasco, the CPSC reevaluated the need for safety of children's sleepwear and said: We really don't need the drip criterion, and they eliminated it.

With the elimination of that criterion, which is the part of the standard which the medical community, in several cases, had indicated in the inception of the standard, was not needed to provide the required safety for the product.

With the removal of that criterion, which was really never needed in the first place and which we argued strenuously against in the first place, there was the removal of necessity for a chemical additive in order to meet the remaining standard. In the view of the Commission, that ultimately did provide the safety required for the consuming public.

So my view is that the standard which was the causal factor for the inclusion of the chemical in the outset should never have been put on us in the first place. By Government action later, it demonstrated that it should never have been put there in the first place.

Second, the Department of Commerce, as I understand it, was under a restriction not to promulgate a standard that was not technologically practicable at the time of its promulgation.

Had it not been for the chemical Tris and that type of additive, they never could have met the criterion. So by Government passing the standard, knowing that to meet the standard this chemical would need to be used, the Government forced the industry into the use of the chemical which they later found, by some opinions, to be a possible carcinogen.

Now our greatest crime was not knowing in the past what the Government later suspected as a possible problem.

Having not been heard effectively in the outset, when we raised the toxicological and dermatological questions in the original hearings and were not heard but were instead the recipients of the onslaught of a perfect example of Federal regulatory overkill and the emotional environment in which those initial standards were passed—that's our crime.

And not one for which we should almost be put out of business and in several cases were put out of business because of that failure to know.

The failure to know on our part, as apparel producers, did not even include knowledge of the chemical that was used. I assume most drug manufacturers are aware of the contents of their drugs.

We were only responsible under the standard for purchasing fabrics which met the standard the Government put on us. We complied perfectly with that requirement in order to meet the standard. We had no part in the use of the chemical, though the Government knew at the time they put the standard on us that the chemical would need to be used or they couldn't have passed the standard in the first place.

Senator BAUCUS. I understand. I think possibly the CPSC was derelict. They didn't think through what they were doing and caused all kinds of problems which now adhere to the detriment of your industry.

Mr. SHIREY. I am really not in a position to contest that. All I know is this particular industry.

One further comment. You suggested that President Carter objected to the bill.

Senator BAUCUS. He vetoed it.

Mr. SHIREY. That's correct. He vetoed it.

In his statement, however, he suggested that some apparel producers quit using the chemical as soon as they knew or should have known of the alleged hazard that the chemical might represent.

The thing that was not pointed out in that veto statement was the fact that even though we did that—quit using as soon as we knew or could have known of the possible hazard—that taking that corrective action did not alleviate the financial damage that we experienced. Product was returned to us that was produced in 1972, 1973, 1974, and 1975, as well as 1976.

Senator BAUCUS. Let me ask you questions about financial hardship.

How many firms are there in the industry?

Mr. SHIREY. About a hundred.

Senator BAUCUS. How many have gone out of business due to the ban?

Mr. SHIREY. Blue Star Knitting Mills of Milwaukee; Walls Industries of New York went bankrupt; Spencer of California locked their doors; Green Bros. of Dallas, Tex., went out of business; Greensboro Manufacturing, a Genesco subdivision, closed its doors and was sold to Genesco; Dreamcrest now is completely out of children's wear; several others were or have been in chapter XI, as Tom indicated earlier in his testimony.

A number of us who remain curtailed our operations because of the financial impact, so we have no firm fix as to an answer on your question, but the impact was there.

Quite obviously, when you only produce $500,000 in total annual volume and the estimated damage 3 or 4 years back was $50 million, you are looking at 10 percent of our annual volume.

When we typically operate on about a 3-percent profit before tax, you are looking at 3 years profit, if you have an even spread throughout the industry.

Of course, that was not really the case, because some participants in the industry had a much greater involvement than others.

Senator BAUCUS. $500,000 volume is the total volume for the industry for all——

Mr. SHIREY. For all children's sleepwear, yes.

I'm sorry. It is $500 million.

Senator BAUCUS. What percentage is children's sleepwear of the total volume of firms in question?

Mr. SHIREY. It would range from very small to 100 percent. The answer would be different for each manufacturer. I do not have an average figure.

Mr. MARCHANT. Our firm, Stone Manufacturing Co., had two plants in North Carolina that were engineered to produce children's sleepwear that was manufactured at that time with Tris.

As a result of the Tris ban, we pulled out of that production cycle and ceased to manufacture it. As a result, we closed those two locations.

My earlier remarks did indicate that we probably would be now at 600 employees in the two plants.

So we depopulated the North Carolina employment ranks by that number of people. But we manufacture other things, and I think it was to our credit that we did have other things that we were involved in that we were manufacturing, other than Tris-made garments throughout the other plants that we operated.

Senator BAUCUS. But were the plants closed solely because of the Tris ban or were there other reasons as well?

Mr. MARCHANT. No.

We had projected a growth pattern in children's sleepwear in these plants. As a result of the Tris ban, we no longer were able to keep these two plants operational with the marketing of Tris-treated type sleepwear. We pulled in those two plants, and we no longer operate those two plants in North Carolina. We do operate a plant in Fair Bluff.

Senator BAUCUS. How many sleepwear manufacturers would be eligible to file claims if this bill passes?

Mr. SHIPPEE. We estimate a maximum of about 75 out of the 100.

Senator BAUCUS. What percentage of those firms are small businesses?

Mr. SHIREY. The vast majority.

Mr. SHIPPEE. Probably all but a handful of them, yes.

The average sales per firm is about $4 million.

Senator BAUCUS. What would the average number of employees be?

Mr. SHIREY. Seventy-five to one-hundred probably.

Mr. MARCHANT. The blue book, the budget document that OMB has published April 1981, indicates on page 343 under the Consumer Product Safety Commission agency that their program description—part of what they say is CPSC is—identifies unreasonable hazards associated with consumer products. Then it goes on to say, "and seeks to control them—unreasonable hazards—through education of consumers."

Then it says, "obtaining voluntary changes in production by the manufacturers."

Had we, the apparel industry, been allowed to either phase out or voluntarily, as some manufacturing companies and as numerous others in the market did, pull out of the Tris market prior to the ban in April of 1977, I think the problem would have been solved by allowing the free enterprise system to operate within the marketplace.

That simply didn't happen. We weren't even allowed to squeeze out the side door. We got the door slammed in our face. It was an open and shut case, and that was it. We were not even allowed to export the merchandise, even though it was properly labeled and permitted to do so under Government regulations.

Numerous of us in the industry did export properly labeled and properly marked, and then were told by the CPSC that we were no longer playing in the same ballpark. They put out an edict that required us to recall this.

They told us we could ship it overseas and export it properly labeled and then they told us we couldn't do it. We had all that time and effort in it, plus the freight coming and going.

Senator BAUCUS. I have 1980 annual reports of five sleepwear manufacturers who reported using Tris in 1977, and none of these firms reported losses in 1977 or 1978, the 2 years most likely to be affected by the ban.

The William Carter Co. began their 1980 report by stating:

> In spite of weakness in the U.S. economy and many sections of the apparel business, 1980 proved to be an excellent year for the William Carter Co. Both sales and earnings reached new highs.

Could you explain what is going on here?

Mr. SHIPPEE. I could speak generally for that company, being somewhat familiar with it.

Sleepwear is only one of three products that the William Carter Co. makes. They also make an extensive basic line of underwear and t-shirts and items of that sort and a playwear operation—playwear being the other clothes that children wear besides sleepwear.

From personal knowledge, I know that their playwear division has had outstanding success and growth over the last few years.

You are dealing there with one of the largest firms in this sleepwear section of the industry.

They had the fortunate benefit of two other divisions to offset their losses, which the average manufacturer did not.

The more often case is what is still happening to me as a staff representative of the National Trade Association, where the small manufacturers are still calling in almost monthly and asking the status of this legislation. They are operating on borrowed money, money which their banks are giving them only in the hopes that this legislation will pass.

I won't talk with you about what the interest rates are that they are paying on that money now. It is astronomical. That interest is being paid for by the consumers of the United States as added costs to the products we are making today.

In addition to the firms that Mr. Shirey listed as already having been exposed to serious suffering, there are innumerable others

that will suffer, if this bank money that they are operating on dries up.

Senator BAUCUS. Mr. Shirey, I understood you to say—in fact, I was a little startled when you said it—that the Consumer Product Safety Commission by letter endorses this legislation.

Mr. SHIREY. That's correct.

Senator BAUCUS. Do they endorse it fully? Are there any limitations or any reservations in that endorsement?

Mr. SHIPPEE. Their vote to support this legislation was taken before the bill was drafted into its final form in the 95th Congress. They supported it with the provision that criteria be included to determine the soundness of individual companies' actions under the ban and under the standard.

Suggestions were made by the CPSC commissioners as to what the nature of that criteria should be. I couldn't find that letter, but I know from personal knowledge that those suggestions originated with the CPSC.

As the bill is written now, there are criteria, which the legislation directs the Court of Claims to consider prior to honoring any claim.

Senator BAUCUS. Is this a letter from the CPSC, or are you basing it upon testimony by the——

Mr. SHIPPEE. It is a letter to Chairman Rodino of the House Judiciary Committee.

Senator BAUCUS. The reason I am asking is because I looked at the testimony of the commissioners. Commissioner Franklin, I think, stated he does not totally support this bill. There should be some limitations. He does not support a blanket indemnification, as was apparently discussed up to that time.

I am wondering, therefore, whether you would support some amendments to the bill which would perhaps limit indemnification to need, or some other situations. Let's say need.

Mr. SHIREY. Need is a rather ambiguous term.

Having gone through hearings, both in the Senate and in the House, previously, my personal response would be that we have been through this once. The Congress voted for it; the Senate voted for it the second time. I think the language has been massaged very carefully. It seems to me that further amendment would only impede the process of judgment which has already been delayed painfully long. I would oppose it personally.

Senator BAUCUS. What about those firms that have already received loans.

Mr. SHIREY. Loans have to be paid back.

Senator BAUCUS. But to the degree that they are low interest loans and subsidized interest loans——

Mr. SHIREY. In fact, in President Carter's amended pocket veto statement, he encouraged the SBA to look favorably on the firms that had been injured.

The Government was the source of injury. For them to subsidize the intervening effect of the injury until the basic cause, which was the injury, was dealt with does not seem to me to abrogate the need to deal with the basic injustice that was initially perpetrated upon us.

Senator BAUCUS. Do you know why the bill does not include attorney fees in the damages?

Mr. SHIREY. It was originally part of the negotiations, as I understand it, which was a part of going through the Senate hearings initially. Some of the Senators voiced privately some exception, as I understand it, to inclusion of such things as profits and attorney fees. We said fine; drop it out.

Mr. SHIPPEE. I believe there was concern at that time that there may have been challenges made in the courts that could have been extremely expensive from an attorney fee point of view.

Immediately after the ban, when that language was drafted, there was no way of quantifying what kinds of numbers these attorney fees would go to.

In order for the Congress to be dealing with a more finite number, they tried to eliminate intangibles.

Senator BAUCUS. Thank you very much, gentlemen. I have no further questions.

I was wondering, Mr. Chairman, if we could keep the hearing record open until we get a letter from the Department of Justice as to their position on this bill. I think it is very important to our deliberations to find out what their view is.

Senator EAST. Fine.

We shall allow the record to remain open for that purpose.

I thank you, Senator Baucus.

I have no additional questions, gentlemen.

Mr. MARCHANT. I have one comment if I may.

In each one of your packets is a catalog to help you become more familiar with some of the problems that the industry has faced by indicating the products that we make. This is true not only of Stone Manufacturing Co. but also of many of the people who are in the apparel manufacturing business to give you a little insight into the type of products we are talking about at the hearing today.

Senator EAST. Thank you.

If there are no more comments to be made, we will stand adjourned until tomorrow at 3 in room H-313.

[Whereupon, at 5:14 p.m., the hearing recessed, to reconvene Tuesday, May 5, 1981, at 3 p.m.]

CLAIMS FOR LOSSES RESULTING FROM BAN ON TRIS, S. 823

TUESDAY, MAY 5, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 3:05 p.m., in room H-313, the Capitol, Senator John P. East (chairman of the subcommittee) presiding.

Present: Senators East and Baucus.

Staff present: Jim Sullivan, counsel to Senator East, and Donna Bowles, staff assistant to Senator East.

OPENING STATEMENT OF CHAIRMAN JOHN P. EAST

Senator EAST. I would like to convene this second hearing on the bill, S. 823, dealing with the Tris issue.

We had hearings yesterday afternoon from witnesses supporting this measure. This afternoon, we have the pleasure and honor of having the Honorable Albert Gore, Jr., Member of Congress from Tennessee, as our first witness.

Congressman, it is an honor to have you with us.

We also have Mr. Joseph Highland, Chairman of the Toxology Section of the Environmental Defense Fund.

Mr. Highland, it is nice to have you with us.

Mr. Gore, would you like to proceed with your statement?

STATEMENT OF HON. ALBERT GORE, JR., A U.S. REPRESENTATIVE FROM THE STATE OF TENNESSEE

Mr. GORE. Thank you very much, Mr. Chairman.

I will ask unanimous consent to put the text in the record, and I will present portions of it orally.

I appreciate your invitation to speak on this issue. I am a member of the House Energy and Commerce Subcommittee on Oversight and Investigations which conducted a series of hearings on the Tris hazard that led to the enforcement program by the Consumer Product Safety Commission and led to improvements in that program.

Consequently, I have an intense interest in this issue and feel the need to express some concerns about recent developments in the area which should be considered in relation to the legislation your subcommittee has before you.

I want to first point out that I believe this bill is merited and is a reasonable response to the claims of companies which incurred significant losses due to the Federal ban on Tris. I support the bill

today, I supported a similar bill in the last Congress, and I continue to support it.

However, recent allegations that a number of companies have violated the law by reselling some of their stock of Tris-treated garments, in my opinion, signals the need for a slightly more restrictive indemnification measure in this Congress.

Following the 1978 recall of Tris-treated goods, the Consumer Product Safety Commission documented inventories of approximately 9 million garments and nearly 1 million yards of Tris-treated fabric held by 76 firms that were not yet cut up into garments.

Since 1979, 3.9 million of the 9 million treated garments and much of the fabric have been destroyed, either by burial in landfills, or by cutting up for use as industrial rags. However, most of the Tris inventories have not been destroyed and remain in the hands of the firms stored in warehouses.

According to the Consumer Product Safety Commission enforcement staff, several of these companies have allegedly removed goods from storage and placed them back on the market in flagrant violation of the law.

In one instance, the CPSC alleges that a company removed Tris-treated sleepwear from its warehouse, actually packaged it with labels reading "No Tris," and then marketed the garment for resale to unsuspecting parents.

In another case, a firm sold its entire inventory of Tris-treated fabric for export to Ghana, and a third instance occurred when a salvage firm which had purchased Tris-treated sleepwear, ostensibly for use as rags, instead sold much of the stock to consumers at its retail outlet as children's pajamas.

Recently, I chaired a hearing of the Oversight Subcommittee to look into these allegations. In addition to CPSC's Executive Director Richard Gross, the subcommittee requested that representatives of the five involved companies be present to present their side of the story. However, none of the companies would consent to appear before that hearing, and not a single one of the alleged violators would appear to defend itself. We may soon have another hearing into this matter.

This kind of behavior and the examples which I have cited exemplify the disregard that these firms have for the health and safety of the Nation's children. Clearly, the actions are willful and irresponsible violations of Federal law and demand strong response from the Federal Government.

We cannot condone these actions by permitting guilty companies to receive reimbursement for those hazardous goods which they have illegally distributed. It would be an injustice to reward willful violators of the law for their crimes.

I therefore strongly urge the subcommittee to amend the bill, S. 823, to reflect these considerations and to prohibit such firms from participating in the indemnification process established in the legislation.

That concludes my statement.

Senator EAST. Thank you, Congressman.

If I might just pursue this point a little bit—again, just reflecting on somewhat of a visceral reaction—would that not certainly be a

factor to consider already in the current bill before the Court of Claims? That is, in adjudicating and determining the laws, if, in fact, there was no loss because of subsequent resale in certain cases, would that not really be implied possibly in the current bill?

First of all, as you know, we are simply providing jurisdiction to the Court of Claims. We are not trying to determine the relative merit of any claim. I was just wondering as to the initial reaction I would have to it.

You have raised an interesting point, of course. There is no question about it. My response would be that it could be a factor that the Court of Claims might like to consider in evaluating the appropriateness of a particular claim.

Mr. GORE. I think the amendment would express a sentiment that goes far beyond the simple denial of money that they have already been able to recover by violating the law.

The sentiment which the Congress expressed in this amendment would be that those companies that were willing to take this kind of action should not participate in the scheme not because they had gotten some money back but because they had committed an action that should disqualify them on its face.

The reason for that is that these companies were given notice of the ban and the reasons for the ban and were evidently willing to risk giving children cancer because they wanted to get some more money by getting this stuff out of their warehouses surreptitiously, putting it on the market as children's sleepwear—in one instance labeling it "No Tris"—so that parents who went in bought it unaware of it.

The purpose of the legislation is to try to indemnify a group of companies that were caught in the middle when the Federal Government put the ban in effect.

The purpose is to reimburse those companies that were caught in the middle because they abided by the law. If the companies did not abide by the law, then I would argue that they should not be reimbursed.

It is, after all, an unusual step that the Congress is taking, to begin with—to indemnify these companies in this instance and should not be regarded as a matter of general principle but an unusual case. And I think it is fair and not at all unreasonable to exclude from that indemnification those companies that exhibited such a gross willingness to violate the law.

Senator EAST. Let me pursue this angle. Again, just trying to get an angle on it, I am a little troubled with compounding the problem of jurisdiction with getting into an actual evaluation of the relative merit of a particular claim.

If what you say in these cases were true and were an established matter of court record, we might want to include it. You are simply presuming that that would be the conclusion of proper adjudication—that if these cases went before the appropriate forum, whatever that forum might be, this would have been the result determined.

If we knew that as a matter of court record, I could see greater merit to it, but I am concerned about entangling a simple matter of jurisdiction to allow claims to be presented with an evaluation or judgment without having heard their particular explanation.

It might be their critics would say that they had violated that law. Perhaps they have—and I would not defend it for a moment. It seems to me there would be other remedies that would be available to the Government to take action against them—a separate proposition.

If they violated the ban, contrary to Federal law, then the Justice Department ought to take the appropriate action. But I am troubled about compounding it with a more simple question of opening up jurisdiction so that those with legitimate claims can come and be heard on the merits.

This bill, as you know, is fairly restrictive in that profits are not included and attorneys' fees are not included. It is strictly loss. They have to prove that they did, in fact, suffer losses.

Without reacting too strongly to your point, I would be a little more comfortable to see that handled elsewhere——

Mr. GORE. Because it is a moral question better handled by the courts than the Congress?

Senator EAST. Well, when you say it is a moral question—you say these companies did this. I do not know that they did it. Perhaps they did do it. Again, if we could come in and say, you will note that in certain court records or in certain administrative determinations it had been shown that Company X, in violation of the Tris ban, did resell x number of children's clothing and received x millions of dollars, or thousands, or whatever it was, and that you think that, as a matter of equity, ought to preclude their pursuing any claims under this particular act, I could see it may be appropriate to take that up because we would accept the conclusion of the court as being determinative of the point.

But you are asking us, it seems to me, to assume conclusions that have not yet been established. As a matter of conditioning jurisdiction and as matter of good legal practice and approach, I am somewhat troubled.

Mr. GORE. It seems to me that there are two separate questions. One is the principle of whether an action of violating the ban should disqualify a company from participating in the indemnification program. The second and separate question is a question of fact: Did company X, in fact, violate the ban?

I would certainly not support an amendment which would have the Congress determine those matters of fact. It would be for this subcommittee to decide who is the trier of fact in that instance.

But having once established that fact and having that fact before the court of claims, then I think the Congress has the right to make a moral judgment and say, because this is an unusual step we are taking to indemnify companies against harm they have suffered, we believe that that indemnification should not extend to companies that have violated the ban.

If you want the court to decide whether or not a particular company has, in fact, violated the ban, then that is a separate question, it seems to me. But having once established that a company did violate it, I see nothing wrong with the Congress denying participation in the indemnification program to those who have violated it.

Senator EAST. It seems to me implicit, though, in our granting jurisdiction to the Court of Claims, that they could certainly waive that factor.

Do you read anything into the bill—to put it another way—that would preclude their weighing that factor—that is, they are to consider actual losses to the company? If, in fact, no loss was suffered, then obviously they would offset it.

On this question of what they intended to do, of course, we need a tribunal. What if they had unintentionally sold in violation of the ban?

Senator BAUCUS. If the chairman would yield——

Senator EAST. Yes.

Senator BAUCUS. I wondered what your thinking would be—because you are generally in favor of the bill—if the bill is amended to prohibit the recovery in those instances where, as a matter of fact, the court, after it goes through its factual determination, concludes that a particular manufacturer did pursue some of the courses of conduct that you are referring to—that is, the resale under a different name of Tris-treated apparel and some of the other things you have suggested? Would that meet your main criteria?

Mr. GORE. Yes. That is the central point. The disqualification should accompany, in my opinion, only a willful violation of the ban.

Again, the principle involved, as I see it, is not that they will have already recovered some of the loss by illegally selling the garments. It is a deeper principle than that. It is the fact that they have, by their own actions, disqualified themselves from being considered for this unusual and extraordinary indemnification that the Congress is allowing the Court of Claims to grant.

The Congress, after all, is in this instance a gatekeeper to the Treasury, and it is conferring a new and special jurisdiction in this instance. It should be justified, and insofar as it is possible to do so the justification should be clearly spelled out in a way that excludes any within the general class that the Congress deems to be unjustified recipients of its generosity and its access granted to the Treasury.

If a company has steadfastly obeyed the law and protected consumers of this country from being exposed to this cancer-causing substance and has sustained a loss in the process, then I think that is one matter.

If a company has winked at the law and chosen to expose children in this country to the risk of cancer, in violation of the law, and then comes to the court and says: "Gee, we weren't able to illegally recover all of our loss; we still need to get some more"—it is just the clean hands principle, it seems to me.

Senator EAST. You raise an interesting point, Congressman. I guess the only difference we are having—and maybe eventually it disappears upon closer examination or ultimate resolution—is that I am a little more comfortable with the courts applying the clean hands rule. I think it is a better function that they can perform.

What we are doing, as I see it, is giving jurisdiction to the Court of Claims—that is all we are doing, and even that is limited—to look at these respective claims. That does not preclude them from

considering a whole range of matters, including the issues you raise.

I am troubled that we are beginning to put a little baggage on it—jurisdiction yes, but; jurisdiction, yes, but; jurisdiction, yes, but. I wonder if we do not run the risk of so clouding the matter than we are going to create more problems than we solve.

I do not wish to be misunderstood, and I am not trying to suggest that people who have intentionally violated the Tris ban should then be able to come back to a tribunal and recover losses. I do not think anyone is proposing that. I would rather let the Court of Claims weigh the issue as far as clean hands, rather than our prejudging it and then maybe moving on to other kinds of personal conduct with this corporation, maybe directly involving Tris, perhaps not.

In short, we begin to construct a clean hands issue, and by mentioning only one thing it might be implied that we are precluding others. I do not know. But what we begin to do is to cloud the jurisdictional mandate, and it could conceivably make it more difficult to come to an orderly resolution of this problem than one that only gives jurisdiction and says: "Court of Claims, you weigh it, and you do what is proper in terms of the law and the equity of the situation." Certainly, they have broad discretion here in what they will weigh.

Mr. GORE. If you believe as a matter of fact that a company that intentionally violated the ban should not be reimbursed, then I would simply urge you to continue to work to try to fashion a limitation on the grant jurisdiction to accomplish that purpose.

I think it is not one of a broad range of items that could all cloud the jurisdictional ground. I think it stands out. I think it is sufficiently egregious that it should be included in the legislation.

I personally find it incredible that these companies, knowing the consequences of their acts, would allegedly intentionally violate the law and sell these products into interstate commerce knowing the effects of it. I find it absolutely incredible, even if it is a foreign country.

I suppose the theory of its being all right to sell it to a foreign country is that the children who get cancer are farther away and therefore easier to put out of one's mind.

It is just incredible to me, and I think that it is so egregious that we ought to make sure that those companies are not going to be given access to the Treasury—to be reimbursed—because what they have done is so wrong that the Congress should decide, as a moral judgment, that what they did was so wrong that they should not be reimbursed, and instruct the Court of Claims in no uncertain terms that that factor is of importance to the Congress.

Senator EAST. Again, perhaps my response would be that any conduct that is so egregious ought to be weighed. We really do not need to mention it. It ought to be weighed and considered.

By mentioning only one kind of egregious conduct it might be implied, or at least so argued by some of these companies once they got there—when a collateral form of misconduct was brought out—that we had only excluded this area and that the Court of Claims was not weighing any other area.

We might be hanged on our own petard here, where we end up precluding companies with poor records of conduct from collecting because of the matter you raise. Yet, in the very fact of mentioning it, it might be implied that we were to preclude others.

I am more comfortable as I start down this rocky road giving jurisdiction because, prima facie, we have some compelling claims here—it would appear, we do not know. Let them take those claims to the Court of Claims and see what the Court of Claims comes up with.

I would certainly believe that not only that kind of conduct, if it was shown in a particular case, would not only be offsetting but perhaps even a barrier to their recovery, or many other things that I cannot foresee nor, frankly, could anyone foresee in the unfolding of the hearings.

We might again, in the name of promoting a good cause, end up hampering the cause because we might restrict what the Court of Claims could do here.

Mr. GORE. First of all, I do not share your confidence that in all instances the Court of Claims is going to come to that result if we do not offer them some guidance on it.

Second, the suggested problem of implied exclusion of other potential clean hands challenges could be taken care of in the instructions accompanying the legislation.

I would just repeat my belief that this action really is in a category by itself and should be so recognized by inclusion in the legislation.

Senator EAST. Thank you, Congressman.

Senator?

Senator BAUCUS. Thank you, Mr. Chairman.

Thank you Congressman for coming. I also want to thank whoever is responsible for making this room available. This is the House Rules Committee hearing room.

Mr. GORE. A very rarified atmosphere for a House Member.

Senator BAUCUS. Often, when we in the other body are trying to figure out our schedule, I reminisce of the case of House Rules Committee that would set the terms of the debate, and so on. As frustrated as I was with the House schedule, it is even worse in the Senate. It may be because we do not have a rules committee in that body.

Mr. GORE. I think your old seat is already taken, so you cannot come back. [Laughter.]

Senator BAUCUS. I think, frankly, you have made a very good case here. Obviously, when we fashion legislation, we have to find some middle ground or balance in trying to enumerate all the conditions, facts, and circumstances, and we do not want to write too broadly or loosely so that the result is entirely different from what Congress intended.

One of the problems in the past has been that Congress tended to delegate too much to administrative agencies. In other cases, those agencies made quasi-judicial determinations.

This discussion is interesting in another respect in that a good number of us, I think, would favor a strict instruction approach, not judicial activism. We want to set some guidelines for the courts on what they should do and not do.

It seems to me that you are correct in outlining that Tris exportation is a special case. It is a case of such obvious moral terpitude—if not a crime, at least objectionable from a moral point of view—that we, in Congress, have a duty to prohibit recovery in those general instances and then leave it to the courts to decide on the facts of the matter. Certainly, we could fashion a bill which does not preclude other considerations which a court should properly determine.

I also think we have some obligation to give some direction to the court so that the court is not free to be an activist court but, rather, more restrictive instructions to the court to decide policy in cases according to how we in Congress generally prescribe.

I have one question. Do you know whether the sales to foreign countries—or maybe to just one country, Ghana—were known in those countries to contain a product banned by an American Federal agency?

Mr. GORE. I ought to know the answer to that, and I do not. I will be happy to supply it for the record.

Senator BAUCUS. If you could, I think that would be helpful.

Senator EAST. Without objection, it will be included at this point.

[According to subsequent information supplied by Congressman Gore, the Consumer Product Safety Commission notified the Government of Ghana of the export of Tris-containing material.]

Senator BAUCUS. Your general view is that apparel manufacturers were caught in an unfortunate situation and they should have some legitimate right to be indemnified for the loss they sustained, but you outline certain situations where, obviously, a majority of us—civilized people—agree there should be no recovery, and suggest we amend the bill to take care of this situation.

Mr. GORE. That is right—those who have been caught in the crunch and who have exhibited a good faith effort to abide by the law. That, it seems to me, expresses it.

Just one final thing—I trust that the subcommittee shares my concern that this legislation not be construed as a general precedent-setting measure for indemnification in all instances where a company has complied with regulations, but that is a matter that I am sure has not raised much disagreement.

Senator EAST. That is an interesting point that Senator Baucus raises there about the Ghana situation. Just exploring that briefly, let us say, for example, we had an amendment here of the type you suggested—a willful selling after the fact. Senator Baucus raised the point of a foreign purchaser knowing what it was purchasing.

It seems to me we get into some subtle problems of intention here. I do not wish to be the devil's advocate in all of this. I am just a little troubled with Judiciary Committees, and Senates, and Houses of Representatives—you have talked about strict instruction, and I fall back on separation of power, so I guess we can all play this game.

To me, courts are uniquely qualified in their atmosphere and in their mission to weigh claims, to weigh facts, to consider all the matters. It seems to me it is a legislative function to determine if we ought to have the court to begin with and if it ought to have jurisdiction over certain kinds of things.

As a matter of separation of power, having determined that we think the court should exist—the Court of Claims—and we think they ought to have jurisdiction over this particular matter, I agonize a bit over this matter of whether we ought to anticipate their findings, and if they find thus and so to be true that it ought to preclude a further course of action.

Unless I saw that the matter had been established that we could not simply trust the Court of Claims to handle this sort of thing and that it was necessary to restrict it, to confine it, and to limit it—it is the matter of the orderly processing of this that concerns me. I do not wish to be misunderstood on the legitimacy and the merit of the points you are raising.

Mr. GORE. Mr. Chairman, when the Congress passes a law saying that anyone who attempts to assassinate a President shall be punished under Federal law, the Congress is not taking from the courts the determination of the facts in the matter, and the Congress is not saying in advance of the trial who is guilty of that crime and who is not. All Congress is saying is that when this fact situation is proven, then such a such a law will apply and such and such a penalty, within certain guidelines, will accrue. It is precisely the same matter.

By saying that when a company is shown to have willfully violated the CPSC mandate here they are not qualified to participate in the indemnification program, we are not telling the courts that we are deciding the fact situation. They decide the fact situation. We are just telling them that we think this is a matter of principle that ought to be upheld.

In reference to the Ghana example, I am not troubled by any subtle questions of intent there at all. If the company had sold to some company in Africa that was similarly ill-motivated—if Colonel Qaddafi wanted to buy cancer-causing substances and distribute them throughout Africa, his evil inclination would not absolve those who supplied him with the material to begin with.

Just because the children affected are on another continent, it does not change the fact that the CPSC order was violated either by the distribution here in the United States or by the distribution overseas in the manner in which it was carried out. It seems to me it is sufficiently repugnant that it ought to disqualify them from the grant of generosity that is under consideration.

Senator EAST. In order to make your amendment operative, what tribunal would have determined willful violation of the Tris ban?

Mr. GORE. The procedure for determining that violation is set out in the CPSC statute, and appeals are provided for. I would be glad to expand upon the response for the record. But the companies have a due process hearing and appeals and are able to challenge the final determination in the courts, if I am not mistaken. So that when the judgment was provided for, the law would be triggered. But, again, that sort of detail is best addressed by the subcommittee.

Senator EAST. Without objection, your full answer will be included at this point.

[Congressman Gore's response to Senator East's request follows:]

The hearing and appeals procedure for CPSC claims is specified in the Code of Federal Regulations (16 CFR Part 1025) and provides extensive opportunity for review. Of the five companies now involved in this appeals process, all are having

their cases reviewed in accordance with these administrative review provisions and before an administrative law judge. Their cases could be further appealed to the Federal Court of Appeals.

Senator EAST. The Court of Claims might decide in an ongoing case where a determination had not been made—because it was an ongoing case, they would decide not to make an award in that case, which would make it more difficult for them to achieve your goal than your own plan would.

You are saying that there would have had to have been a determination with the appropriate tribunal of, in fact, the willful violation of the Tris ban. What if, in fact, in the process of the Court of Claims considering its cases, that determination was still on appeal?

Mr. GORE. I think the existence of appeal should not absolve the question on the jurisdiction. If later the appeal overturned the initial finding, then I think the company would have the right to come back and pursue the matter once again.

But the fact that they have been found in violation at the first level should be sufficient to deny the indemnification. Then, if that decision was reversed, the situation would change, and they could come back.

Senator EAST. I suppose, as I said, we are really not at odds on the ultimate results that sales in violation of the Tris ban should be factors that would mitigate against recovery.

Mr. GORE. No; I am in disagreement with that statement. I disagree with it to the extent that I do not think it should be a factor that should mitigate against recovery. I think it is so egregious that it ought to absolutely, flat-out prevent recovery.

Senator EAST. Well, of course—again, being the devil's advocate, if I might—let us find that with a particular company they were left with $200 million worth—just picking a figure out of the sky——

Mr. GORE. It is way up in the sky.

Senator EAST. Well, $5 million or $3 million. Let us say some small company out in Texas was left holding the bag with $2 million in Tris garments. Let us say it turned out that one of their overzealous agents—an underling in the company—did sell $50,000 worth to Ghana.

You are saying that if that determination were to be made it would preclude any recovery by that company in any way, shape, or form. Obviously, the $50,000 would be out, but they could not recover any of the balance. So they would be precluded.

What I am getting at is this. You get into the complexity of fact and evaluation. Those are uniquely court functions. They would have to balance a variety of factors in trying to find equitable results.

I just wonder if legislative bodies are well-equipped to try to prejudge that—to guess at it—and that is what we are trying to do here.

Mr. GORE. If there were an infinite range of possible examples that would come up, the objection might have more validity. But there is a very limited number of cases involved here, and the Congress is familiar with the specifics of each violation that has allegedly occurred. They do not exhibit the kind of reductio ad absurdum qualities that the specific example you cited contained.

Senator EAST. But it might not be. The question of fact would be determined by the appropriate tribunal—in this case, the Court of Claims.

Mr. GORE. Of course, laws are blunt instruments. Whether the Congress makes the decision or the courts make the decision, sometimes absurd results occur. I do not think that any such results would occur as a result of this amendment because of my familiarity with the examples that we are talking about.

But, of course, you are quite correct in saying that whenever the Congress seeks to venture into moral areas, such as the example that you cited, and take away the ability of the courts to make moral distinctions in given circumstances where the hardships involved with a particular person who is affected by the law had escaped the attention of the Congress when the consideration first came before the Congress, there is always that danger.

Senator EAST. I am a little troubled. You have supported the Tris bill in the past as it was, and the Senate passed it previously, and the House. The industry, if we feel they have a legitimate claim—and both Chambers have unanimously—not unanimously, but the Senate did last time, as I understand, come very close to that—it strikes me that the industry is going to begin to think at some point that we are playing a little bit of a shell game with them.

We keep saying, yes, we in the Congress are for it, and then when we are on the threshold of doing it, we always come up and say that there is one more thing we have finally decided to slip in here.

Mr. GORE. May I respond to that?

Senator EAST. Well, let me finish. What I am saying is, before we know it, we are stymied and there is a certain degree of paralysis. I am not saying that is the motivation, but it could be so interpreted. I know that is not the intention, but it might be so interpreted by them that it is the runaround game again.

We all agreed before it was a good idea but, frankly, just had some problems with the White House on it. But there was finally a very broad consensus of view—as much as you can get in both Chambers of this U.S. Congress—that there was a legitimate claim here—let us give jurisdiction, let us send it to the Court of Claims, and let us see what they can come up with, let us trust them.

But now we add another little twist to it. Then, pretty soon, somebody will come in with another little twist to it, and another little twist. That was not troubling Congressmen and Senators before.

Mr. GORE. The violations had not occurred before.

Senator EAST. Perhaps, but then other things may be cropping up.

Mr. GORE. May I respond to your initial question?

Senator EAST. They are going to begin to question, frankly, our good intentions on this. We say: "Yes, gentlemen, we agree, and we want to try to provide you jurisdiction to get relief, but, but, but, but * * *." Pretty soon, they are going to decide:

> I don't think they are leveling with us. I think that no matter how we go about it, they are always going to add another little string—another qualification—another thing that will do what? It won't hurt us so much if we can ever get to the Court of Claims, but it means it can't get through their legislative process.

I am concerned about that.

Mr. GORE. Presumably any temporary uneasiness will not be terminal and will be overcome when the money is eventually forthcoming. If this President signs the legislation, then the money will be forthcoming.

The uneasiness, of course, will not be temporary for those companies that have willfully violated the ban and are guilty of the kind of egregious behavior that is under discussion here.

Let me just assure you, Senator, that my motivation is not a coy one. I support the legislation sincerely, and I was sincerely disappointed when President Carter vetoed the legislation in the last Congress. The reason I was is that I was afraid that what has happened would happen.

I did not really believe it would because I believed that these people had more of a conscience of that and that they would not do that. But that I knew that they would be under financial pressure, and I knew that some of them would be tempted to recover some of their money even though it would create a substantial risk of cancer and, according to the statisticians, certain cancer among a set number of people. The number of garments involved is such that the risk comes above the threshhold of hypothetical cases.

I was concerned that would happen, and I was sincerely disappointed when the President vetoed it, and I support the legislation this year.

My motivation is not in any way to encumber the bill so as to slow down its progress or to make its passage unlikely. In fact, one can argue the reverse—that the public outrage over the actions of these companies that willfully violated the ban could be so severe that the legislation which might make it possible for those companies to be paid out of the public treasury would actually hamper the chances of the legislation passing.

Senator EAST. Of course, if Congressmen and Senators begin to so speculate, that becomes a self-fulfilling prophecy.

Mr. GORE. You were the one who started the speculation on their hurt feelings.

Senator EAST. What you are saying is that we could not expect the Court of Claims to consider that kind of thing, and once that cat is out of the bag then you might say:

> Gee, maybe we ought to begin to look at this thing again more carefully. And maybe this alone should not be enough of an encumbrance, there ought to maybe be other dimensions of this thing.

As you said, we did not realize it a couple of years ago. Who knows—if we delay another 2 or 3 years, we may find other things.

At some point, I believe the people in this business, who have worked so hard and have had so much support in the Congress for the legitimacy of their claim, are going to—understandably—come to the conclusion that we really are not genuinely interested in getting their claims to the Court of Claims under a straight bill of jurisdiction, but what we are really interested in doing is playing cat and mouse with them.

I know that is not your intention. I may misspeak, and I may overreact to it, but it does not sound to me like a totally untenable position that they might take on this.

Mr. GORE. Well, if their feelings get hurt during the process, that is certainly a matter that the Congress ought to take into consideration and keep them from getting worried. But, I repeat, I think they will get over that when they get reimbursed. The only ones who will not get over it are the ones who have violated the law and will never be reimbursed if the legislation is so amended.

I do not think we ought to give too heavy consideration to the temporary uneasiness that would dissipate when the legislation was passed.

Senator EAST. The companies that willfully violate—it is a matter of determining what you mean. What magnitude of the violation? These are subtle questions of fact.

I fear that a company might possibly say:

> If we happened to move a pile of material or sleepwear, they are going to throw it up as a barrier to our recovering anything. What they are really doing is giving with their right hand and taking back with the left hand.

They may not say that, I do not know. I frankly do not know what the companies would say.

I do not know what those who have had to live with problem—which we all agree is a bad one from their standpoint—would say. I do not know the percentage of people we are talking about who violated the ban.

Mr. GORE. Very small.

Senator EAST. So we end up clouding the whole with some alleged misconduct by a very small group of people, compounding the problem of the legislative process, throwing a lot of doubt out into the minds of our fellow Congressmen and Senators. Before you know it, the word is out: "Hey, a lot of these people in violation of the Tris ban—we have finally blown the whistle on them. They are phony. This is what they have been doing."

Before you know it, we will have fanned those flames enough, and they will say: "Well, maybe we ought not to do this." And you, yourself, would admit that that cure would be worse than the disease.

Mr. GORE. I will just repeat the alternative concern. When this legislation comes over from the Senate to the floor of the House, I do not have any problem whatsoever imagining a Member of Congress standing up and saying:

> Can you assure me that the U.S. Treasury is not going to, under this legislation, give taxpayers' money to companies that I read about who willfully violated the law and sold cancer-causing garments to children in this country.

If the manager of the legislation has to respond:

> Well, I can't give you that assurance because the Senate refused to so limit the jurisdiction, but we have some hope that the Court of Claims will adopt that principle, even though we have seen fit not to.

That, I think, could impede the progress of the legislation.

Senator EAST. It has not impeded it in the past, though, Congressman. This speculation about a very small group of violators in the past.

Mr. GORE. Because it was not a factor in the past.

Senator EAST. I am just afraid that if we raise it and dignify it as an amendment, and begin to limit the jurisdiction, and what we had hoped to give was some form of equitable relief merely in terms of jurisdiction, at the very moment we give that avenue we

cloud it and we encumber it, maybe unintentionally—certainly unintentionally—and the motives are very good.

But then I see this subtle problem of trying to prejudge what Courts of Claims or, frankly, courts of general jurisdiction, might find. It strikes me as a judicial function, not a legislative function.

Senator BAUCUS. Mr. Chairman, might I suggest that no minds are going to be changed here. I also have another hearing for which I am late now. I wonder if we could have some limit on the discussion here?

Senator EAST. Do you have anything else to add?

Senator BAUCUS. Just a couple of questions, if I may.

Senator EAST. You are going to prolong it a little bit?

Senator BAUCUS. I will not take more than 2 minutes. They are factual questions.

Senator EAST. Go ahead.

Senator BAUCUS. Do you suggest that the bill be amended to require companies to dispose properly of all their products or show that they have disposed of all their products—by burning or burying them, or whatever—before they are entitled to relief? Do you think it is a good policy for a company to continue to warehouse these products?

Mr. GORE. No, I think we ought to get the garments and the material out of the warehouses and either destroyed or in landfills or disposed of in some way that does not lead to the harm we are trying to avoid.

Senator BAUCUS. Thank you very much.

Senator EAST. Thank you, Congressman.

Mr. GORE. Thank you, Mr. Chairman.

Senator EAST. Without objection, your full statement will be included in the record.

[The prepared statement of Congressman Gore follows:]

PREPARED STATEMENT OF CONGRESSMAN ALBERT GORE, JR.

Mr. Chairman, members of the subcommittee, I want to express my appreciation for the opportunity to speak to you today on this issue. As you know, I am a member of the House Energy and Commerce Subcommittee on Oversight and Investigations which conducted a series of hearings on the Tris hazard that led to a more effective enforcement program by the Consumer Product Safety Commission. Consequently, I have an intense interest in this issue and feel the need to express my concerns about recent developments in this area which should be considered in relation to this legislation.

Mr. Chairman, I want to first point out that I believe this bill is merited and is a reasonable response to the claims of those companies which incurred significant losses due to the federal ban on Tris. When a similar bill passed the Congress previously, I joined the majority of my colleagues in supporting it.

However, recent allegations that a number of these companies have violated the law by reselling their stock of Tris-treated garments, in my opinion, signals the need for a more restrictive indemnification measure.

Following the 1978 recall of Tris-treated goods, the Consumer Product Safety Commission documented inventories of approximately 9 million garments and nearly 1 million yards of Tris-treated fabric held by 76 firms. Since 1979, 3.9 million of the treated garment and much of the fabric have been destroyed either by burial in landfills or by cutting for use as industrial rags. However, most of the Tris inventories have not been destroyed and remain in the hands of the firms, stored in warehouses.

According to the Consumer Product Safety Commission enforcement staff, several of these companies have allegedly removed these goods from storage and placed them back on the market, in flagrant violation of the law. In one instance, the CPSC alleges that a company removed Tris-treated sleepwear from its warehouse,

packaged it with labels reading, "No-Tris," and then marketed the garments for resale to unsuspecting parents.

In another case, a firm sold its entire inventory of treated fabric for export to Ghana. And a third instance occurred when a salvage firm, which had purchased Tris-treated sleepwear ostensibly for use as rags, instead sold much of the stock to consumers at its retail outlet.

Recently, I chaired a hearing of the Oversight and Investigations Subcommittee to look into these allegations. In addition to CPSC Executive Director Richard Gross, the subcommittee requested that representatives of the five involved firms be present to present their side of the story. However, none of these companies consented to appear before that hearing. Not one of the alleged violators would appear to defend itself.

This kind of behavior and the examples which I have cited exemplify the apparent disregard that these firms have for the health and safety of the Nation's children. Clearly, these actions are willful and irresponsible violations of federal law and demand a strong response from the Federal Government.

We cannot condone these actions by permitting guilty companies to recieve reimbursement for those hazardous goods which they have illegally distributed. It would be a gross injustice to reward willful violators of the law for their crimes. I strongly urge the subcommittee to amend the bill S. 823 to reflect these considerations and to prohibit such firms from participating in the indemnification process established in this legislation.

Senator EAST. The next witness will please come forward. We welcome you, Mr. Highland. Would you proceed, please?

STATEMENT OF JOSEPH HIGHLAND, CHAIRMAN, TOXICOLOGY SECTION, ENVIRONMENTAL DEFENSE FUND, WASHINGTON, D.C.

Mr. HIGHLAND. Thank you, Mr. Chairman.

I would like to ask that full text of my written statement appear in the record.

Senator EAST. That will certainly be done, and if you would therefore like to simply summarize your comments that will be very appropriate and very helpful, as a matter of fact.

Mr. HIGHLAND. Yes, sir.

As my written testimony says, I am currently the chairman of the toxic chemicals program of the environmental defense fund, a nonprofit, public interest organization that during the last 5½ years has worked to improve the quality of life by supporting public policies that minimize or eliminate the use of hazardous toxic chemicals.

On several occasions during the past 5 years we have been before the CPSC, and specifically we were heavily involved in the issue of Tris.

My testimony focuses on the question of whether the companies involved in the marketing of Tris-treated sleepwear should be indemnified for the losses they incurred when CPSC banned the sale of Tris-treated sleepwear.

As you are well aware, the use of the chemical flame retardants in children's sleepwear was in response to the public protest against so-called torch sweaters and in response to the passage by Congress of the Flammable Fabrics Act in 1967.

The textile industry responded to the promulgation of standards by the introduction of sleepwear treated with chemical flame retardants, and in 1972 the William Carter Co., which dominated the market, announced it would begin marketing a new line of flame-retardant sleepwear—polyester garments treated with Tris.

The use of Tris in the garments was extensive, and in some cases it totaled 5 to 10 percent of the total weight of the garment.

The issue of whether those involved in the marketing of Tris sleepwear should be indemnified for losses they incurred raises several important questions.

Before addressing the specifics, let me state that in general it is the position of the Environmental Defense Fund that those who produce, market, and sell products subsequently found to be hazardous should not be indemnified for losses incurred because of subsequent Federal Government action to curtail the sale of these hazardous products.

The taxpayer should not be responsible for these losses. It is the producer, not the Government, who must bear the primary responsibility for safety.

Indemnification of losses following legitimate health and safety regulation would tend to decrease the marketplace safety because it would destroy the incentive of producers to police themselves for such hazards.

Producers should have maximum incentive to test their products at an early stage and remove hazardous components. If producers know that their economic losses will be repaid in the event of a safety ban, the incentive to police themselves will be lost.

We approach the question of the appropriateness of indemnifying those affected by the Tris ban with this same general perspective. However, in the Tris case it is important to consider whether the affected parties knew or should have known the hazards posed by exposure to Tris.

It is our belief that the answer to this question is pivotal in determining whether a party should be indemnified for losses.

EDF believes that it would be entirely inappropriate for the manufacturer of the chemical, Michigan Chemical Corp., to be indemnified for any losses they bore. We take this position because we believe that as a major chemical company Michigan Chemical Corp., should have—indeed, may have—had knowledge about the potential health risks posed to consumers by exposure to Tris.

While certainly the last decade has shown a great increase in our ability to judge the toxicological properties of chemicals, it is certainly known that in the 1970's toxicological testing of chemicals did occur and could be done. As a matter of fact, there was evidence even at that time that Tris was absorbed through the skin under conditions of exposure.

We therefore believe it would be inappropriate to indemnify the chemical companies for their losses, if any.

Similarly, those fabric manufacturers who applied Tris to fabric to make it flame-retardant also had a responsibility to question and determine the potential risk to consumers from exposure to Tris-treated fabrics.

They were in a position to know the amount of Tris being applied to the garment and left in the garment at the time of marketing, and they were also in a position to know that exposure to Tris-treated fabric led to absorption of Tris through the skin.

They had a responsibility to question whether Tris posed a toxicological risk and to have obtained those data either from the chemical manufacturer or through independent testing.

For these reasons we believe it would be inappropriate for the Federal Treasury to indemnify fabric manufacturers who applied Tris to their products.

It is important to note that during the discussions that preceded the promulgation of regulations the issue of possible health hazards was raised by one of the sleepwear manufacturers, the William Carter Co.

However, even though the concern was raised, neither that company nor the sleepwear industry at that time conducted toxicity tests on Tris.

Therefore, although it could be argued that the political and social conditions that existed at the time forced the industry to use a hazardous chemical which they were reluctant to use, the fact that they performed no toxicity testing leads one to question the depths of their true concern. It shows that they failed to fulfill their responsibility to obtain toxicity data on the product they were marketing. Therefore, we conclude that they, too, should not be indemnified for losses.

The sector of the industry most heavily hit by the Tris ban in terms of financial losses were those involved in the actual manufacture of the sleepwear garments.

As stated earlier, we believe that in general Federal tax dollars should not be used to indemnify industries for losses that occur because of the implimentation of health and safety standards.

It is with great caution, however, that in this case we support the indemnification of this part of the sleepwear industry, believing that they were unaware of the hazards posed by Tris and largely because of the structure of that part of the industry—namely, its small size—unable to judge the potential hazards that Tris posed.

We would prefer to see these companies indemnified for their losses by the fabric manufacturers and ultimately by the chemical company that produced Tris, and we would support appropriate legislative language that sought to provide for reimbursement of money paid out of the Federal Treasury for indemnification from the original chemical manufacturers.

I would like to make clear that, while EDF supports limited indemnification in this particular case, we believe that of those who may qualify for indemnification anyone who was or is involved in the export or illegal sale of Tris-treated sleepwear should not be indemnified for losses they sustained. This has been an obvious point of discussion for the last hour, and I will not dwell on it.

In addition to the limitation for export and illegal sale, we are concerned about the amount of money that may actually have to be paid out under the indemnification. We face a situation of very intense efforts today to cut Federal spending and Federal taxes. Many argue that no Federal indemnification should be provided for any of the parties affected by the Tris ban.

We believe that, if selected indemnification could take place for those particular parties I mentioned who were truly adversely affected, this may be a reasonable approach.

Let me clarify that last point. My concern, given limited Federal dollars, is simply that the indemnification be provided for those

garment manufacturers who are truly adversely financially affected by this ban. We think the indemnification should be selective.

That completes my testimony. I would be glad to answer any questions you may have.

Senator EAST. Thank you, Mr. Highland. Without objection, your full statement will be included at this point.

[The prepared statement of Dr. Highland follows:]

PREPARED STATEMENT OF DR. JOSEPH HIGHLAND

Good afternoon, my name is Dr. Joseph Highland. I am Chairman of the Environmental Defense Fund's (EDF) Toxic Chemicals Program.

EDF is a non-profit, public interest organization with over 45,000 members across the United States. During the last five and one-half years EDF's Toxic Chemicals Program staff has worked actively to improve the quality of life by supporting public policies that mininize or eliminate the use of hazardous toxic chemicals. As part of this effort, we have testified on numerous occasions before congressional committees and have sought action by regulatory agencies such as the Environmental Protection Agency (EPA), the Consumer Product Safety Commission (CPSC), and the Food and Drug Administration (FDA) on individual chemical hazards or for changes in public policy related to the production, use and disposal of toxic chemicals. When necessary we have undertaken litigative action to secure these goals. In addition, we have maintained a public education program designed to provide individual consumers with answers to questions about the significance of chemical contamination in the water they drink, the air they breathe, the products they use and the food they eat.

On several occasions during the past five years we have had an opportunity to be before the CPSC addressing issues related to the chronic health hazards posed by the use of particular consumer products. My testimony today focuses on the question of whether those companies involved in the marketing of Tris-treated sleepwear should be indemnified for losses they incurred when the CPSC banned the sale of Tris-treated sleepwear.

Tris (2,3-dibromopropyl phosphate) is a flame retardant chemical that was used on children's sleepwear during the mid-1970s. Tris is largely insoluble in water. It is applied to fabrics from an emulsion, and the fabrics then undergo heat treatment, which allows the compound to penetrate the outer layer of the fiber and become physically "embedded" without actually reacting chemically or significantly altering the basic fiber.

The use of chemical flame retardants in children's sleepwear was a response to public protest in the early 1950s against so-called torch sweaters that could ignite instantly upon exposure to a flame. Congress passed the Flammable Fabrics Act and in 1967 Congress enacted amendments to the Act under which the National Bureau of Standards in the Department of Commerce was designated to develop a test for flammability of children's sleepwear. In 1971 Commerce promulgated sleepwear standards for sizes 0 to 6X that took effect in July of 1972. In 1975 the CPSC issued similar standards for sleepwear standards in sizes 7 to 14. These standards required that all sleepwear sold for children under the age of about 13 meet minimum federal flammability standards.

The textile industry responded to the promulgation of standards by the introduction of sleepwear treated with chemical flame retardants. In particular, in 1972 the William Carter Company, which dominates the children's sleepwear industry, announced it would begin marketing a new line of flame retardant sleepwear—polyester garments that had been treated with Tris. By 1975 total sales of flame retardant textiles amounted to almost 394 million dollars and by 1980 sales were expected to reach more than 817 million dollars. In 1976 about 3 million pounds of Tris was used to flame retard children's sleepwear and the quantities used on polyester, acetate and triacetate blends were exceptionally large, generally varing from 5 to 10 percent of the total weight of the treated garment.

The issue of whether those involved in the marketing of Tris treated sleepwear should be indemnified for losses they incurred raises several important questions. Before addressing the specifics of the Tris situation, let me state that in general it is the position of the Environmental Defense Fund that those who produce, market and sell products subsequently found to be hazardous should not be indemnified for losses incurred because of subsequent federal government action to curtail the sale of these hazardous products. The taxpayer should not be responsible for these losses. It is the producers, not the government, who must bear primary responsiblity for safety. Indemnification of losses following legitimate health and safety regulation

would tend to decrease marketplace safety because it would destroy the incentive of producers to police themselves for hazards. Producers should have maximum incentive to test their products at an early stage and remove hazardous components. If producers know that their economic losses will be repaid in the event of a safety ban, the incentive to police themselves will be lost.

We approach the question of the appropriateness of indemnifying those affected by the Tris ban with this same general perspective. However, in this case it is important to consider whether the affected parties knew or should have known about the hazards posed by exposure to Tris. It is our belief that the answer to this question is pivotal in determining whether a party should be indemnified for losses incurred by the Tris ban and that the answer to this question is different for different affected parties.

EDF believes that it would be entirely inappropriate for the Michigan Chemical Corporation, the major producer of Tris, to be indemnified for any losses it might have suffered due to the CPSC ban on the sale of Tris-treated sleepwear. We take this position because we believe that as a major chemical company Michigan Chemical Corporation should have and indeed may have had knowledge about the potential health risk posed to consumers exposed to Tris. Without question, our ability to judge the toxicological properties of chemicals has greatly improved during the last decade but this in no way implies that chemical manufacturers were unable to ascertain the toxicological properties of chemicals produced in the early 1970's. To the contrary, toxicological testing of drugs and of pesticides was routine 10 to 15 years ago. Consequently, Michigan Chemical Corporation had a duty to evaluate the potential hazards posed by the chemical products they were producing. In addition, Michigan Chemical Corporation developed evidence that exposure of skin to Tris-treated fabric resulted in the appearance of delayed hypersensitivity in those exposed. This type of reaction demonstrated the fact that Tris was absorbed through the skin under the conditions of exposure. We therefore believe that it would be highly inappropriate to indemnify for loss Michigan Chemical Corporation because of the position they were in to know of or have determined potential adverse health impacts from exposure to Tris.

Similarily, those fabric manufacturers who applied Tris to fabric to make it flame retardant also had a responsibility to have questioned and determined potential risk to consumers from exposure to Tris-treated fabrics. They were in a position to know the amount of Tris being applied to the garment and that exposure to Tris-treated fabric led to absorption of Tris through the skin. They had a responsibility to question whether Tris posed a toxicological risk and to have obtained data on toxicological testing either from the chemical manufacturer or through independent testing of their own. For these reasons we believe that it would be inappropriate for the federal treasury to indemnify fabric manufacturers who applied Tris to their products.

It is worth noting that during the controversy that ensued prior to the Commerce Department's promulgation of standards in 1971, officials of the William Carter Company had argued that the standards might require the use of chemicals that would be a health hazard. Although Carter's concerns were mainly addressed to allergic skin reactions, their concern was interpreted by many as diversionary and designed only to forestall the institution of stringent flammability standards. If Carter's concern was indeed serious, it is surprising that neither Carter nor the sleepwear industry conducted toxicity tests on Tris. Therefore, although it has been argued that the political and social conditions that existed at the time "forced" the industry to use a hazardous chemical which they were reluctant to use without further testing, the fact that they performed no toxicity testing leads one to question the depth of their true concern and shows that they failed to fulfill their responsibility of obtaining toxicity data on the product they were marketing. We conclude, therefore, that fabric manufacturers should not be indemnified for any losses suffered.

The sector of the industry most heavily hit by the Tris ban in terms of financial loss were those involved in the actual manufacture of the sleepwear garments. As stated earlier, EDF believes that in general federal tax dollars should not be used to indemnify industries for losses that occur because of the implementation of health and safety standards. It is only with great caution that in this case we support the indemnification of this part of the sleepwear industry, believing that they were unaware of the hazards posed by Tris and largely because of the structure of this part of the industry, namely its size, unable to judge the potential hazards that Tris posed. We would prefer to see these companies and individuals indemnified for their losses by the fabric manufacturers and ultimately by the chemical company that produced Tris and would support appropriate language that sought to provide for

reimbursement of monies paid out from the federal treasury for indemnification from the original chemical manufacturers.

I would like to make clear that, while EDF supports limited indemnification in this particular case, we believe that of those who may qualify for indemnification anyone who was or is involved in the export of Tris-treated sleepwear should not be indemnified for losses they sustained. EDF strongly believes that products determined to be hazardous in this country and banned for use should not be sold in other countries for the same or similar use. In addition to excluding exporters from qualifying for possible indemnification, EDF is also concerned that indemification monies only be used for those who sustained serious financial damage that significantly affected their economic well being. Because of our strong belief that the government should not be indemnifying manufacturers of hazardous products, we feel that it would be inappropriate for government funds to be used except on an extremely selective basis.

We face today a very intensive effort to cut federal spending and federal taxes. Many argue that no federal indemnification should be provided for any of the parties affected by the Tris ban. We believe that if selective indemnification is to take place that only those truly adversely affected should be indemnified.

That completes my testimony. I'd be glad to answer any questions you might have. Thank you for your attention.

Senator EAST. Dr. Highland, in terms of the basic bill that is before us, how would your proposal alter it, would you say?

Mr. HIGHLAND. As I understand the bill, it is not intended to idemnify the manufacturer of the chemical Tris. That concern is expressed. We would alter it in the sense that those who produced the fabric and used the Tris to treat the fabric which was eventually sold for the production of sleepwear would not be able to collect money.

The argument that I offer in support of this position is the fact that I think they had a responsibility and an ability to foresee potential problems. In fact, they had some knowledge and could have had more from requesting data from the chemical company or had tests done themselves, and were aware of the issues. So I think they had that responsibility and should not be indemnified for loss.

The people who are caught in the biggest crunch, I think, who are the actual garment manufacturers, who in our judgment, had less of an ability to have seen the eventual problem and suffered a significant financial loss. We would support their receiving the funding for their losses.

I think it is in that first sector—those who applied the Tris to the fabric—that we would differ with what is proposed in the bill, if I understand it correctly.

In addition, we have pointed out that with regard to export or resale within the country willfully against the intent of the CPSC ruling, which you discussed at length with Congressman Gore, we would basically be in support of the position he offered, which is that those people should be excluded from indemnification and relief.

The third point, which I expressed as a concern, is that given the limited amount of money that is available in these times of restrictions on Federal spending and on taxation, that those who get relief through this legislation, not be those who suffered only minor impact and no real damage to their operations. I don't believe they should be getting money out of the Federal tax coffers.

Senator EAST. It is really the textile people that you are taking out. You feel that the bigger textile firms could have or—if they did not—should have determined some way of determining that this was toxic—that they had the capacity and resources to do it?

Mr. HIGHLAND. Yes. It is my understanding they were concerned enough to run the traditional patch test to see whether Tris was absorbed through the skin and found it was.

Once you know a chemical compound is absorbed through skin, you have a responsibility to look at its potential toxicity as well if you are going to put it in the garment of a young child. And they did not.

I am distinguishing those who, I think, had the capability to have asked these questions and should have asked them from those who are too remote from that point and because of their size and resources would not have even been able to ask these questions, those who cut and sew garments. They would not likely been able to reasonably ascertain that information.

Senator EAST. To me, it becomes a matter of considerable speculation or even assumption to say that a textile manufacturer ought to be able to develop the resources to determine and anticipate the long-term effect of something like Tris, a substance they have taken from the chemical companies who apparently lacked the technological sophistication. Maybe the science had not matured sufficiently at that point, I do not know, but obviously they could not do it, and they were responding to a need imposed by the Government itself.

I am a little bit troubled here about whether we do not, once again, begin to cloud the cause of action by making certain kinds of assumptions or implying certain kinds of motives that may be wholly unwarranted if one could really get into a tribunal that had the expertise and competence to evaluate all these dimensions of it, even assuming that everything you say has a degree of validity to it.

I would offer this thought, because you certainly agree that the apparel people were left literally holding the bag here. I do not see why the Court of Claims could not look at any of these factors.

Again, it is getting to the point I was making with Congressman Gore. He wants to have this question of willful violation in the ban. He wants to say, well, this company could have conceivably developed the technological ability to have determined that it was not a good thing.

You both raise interesting points that might be legitimate points before the appropriate tribunal which is weighing the relative merits of the individual claim of a particular company, be it apparel or textile.

But I am going to keep falling back—as a member of the Judiciary Committee, I feel our responsibility is to provide jurisdictional relief where everyone seems to be agreed—even you and Congressman Gore—that there already is a broad category of people who need relief. Let that go over to the Court of Claims. Let them sort that out. That is a uniquely judicial function.

I am not at all meaning to belittle or deprecate what validity there could be in your analysis.

Mr. HIGHLAND. Could I respond briefly, because I think the issues are similar to those which you discussed with Congressman Gore?

Senator EAST. Certainly.

Mr. HIGHLAND. The issue, it seems to me, is that you want to provide jurisdiction for people who have a legitimate claim to have their claim judged.

Senator EAST. Yes.

Mr. HIGHLAND. What I am suggesting is that you limit that class because some people, by definition—and granted it is the definition I am suggesting to you—do not have a claim before that court—those who, as Congressman Gore said, exported these materials in violation of the ban or resold them.

And I have added to that—believing that the necessary science was developed to test Tris—the chemical company that made Tris.

It is not in any way to have Congress do the judicial act of weighing the evidence and making the judgment. It is to say that Congress has defined a certain class and that class has bounds on it.

Then, within that class, each one that has a legitimate claim can come before the Court of Claims and have the claim weighed. They may not get reimbursed for many reasons, or they may, but there are certain groups—either because of their behavior which Congressman Gore described in moral terms or, I would say, affected parties that equally had a moral responsibility to have done something and did not—that I ask be precluded.

That is the difference. I think you are talking about weighing it as a factor. I think Congressman Gore was suggesting—and I am suggesting in this context—that that is not a factor to be weighed.

Senator EAST. Senator?

Senator BAUCUS. Thank you, Mr. Chairman.

Would you outline for me more clearly why you think the textile manufacturers should have had more notice of the potential danger of the product?

Mr. HIGHLAND. It was obvious from some of the material in the record that that concern was raised, at least by one of the major manufacturers, of the potential use of a harmful chemical.

If one goes back and looks at the general uses of chemicals at the time or pesticides, we were sensitized to the fact that exposure to certain chemicals could have adverse health effects in the short term or long term.

Senator BAUCUS. Could you be more specific—give me more specific examples of what occurred that would put an ordinary and reasonable person on notice?

Mr. HIGHLAND. It seems to me one has to look at what scientific tools for assessment of toxicological risks were available as well as what tools were available to judge whether exposure would occur.

All I am suggesting to you is that the scientific data or tests existed—the short-term test, not the aims test which was mentioned in 1975 and highlighted the problem, but other types of short-term tests as well as long-term toxicity testing plus chemical structure analysis—which I think should have been part of an initial test battery when the chemical was going to be applied to a fabric which would be in contact with the skin of young children.

Concern should have been further stimulated by the fact that so much of the chemical remained in the fabric and was accessible from the fabric.

Senator BAUCUS. It is my understanding that the Environmental Defense Fund opposed recovery for both the apparel manufacturers and the textile manufacturers in earlier proceedings on this bill—is that correct?—that is, before the House.

Mr. HIGHLAND. There was testimony before the House opposing uniform indemnification. There was also some writing by the EDF earlier suggesting that indemnification of the apparel manufacturers might be an appropriate thing.

Senator BAUCUS. So it is not a change of view. If it were, I was going to ask why the change.

Mr. HIGHLAND. I do not think it is a change of view. I can only offer it as a clarification of what I believe is confusing if you look back at what we had stated previously. But I think it is fair to say that at the current time our point of view is as expressed in the testimony.

Senator BAUCUS. One thing you might address is the degree to which any proceeding before the Court of Claims is an adversarial proceeding to the same degree that most judicial proceedings are.

I think one of the assumptions suggestive of the chairman's apparent view is that because the court is a legitimate forum in which to hear these kinds of claims and because ordinarily in most judicial proceedings the courts balance and weigh evidence, there is an assumption that the various views are articulated fairly well and precisely so that the tribunal can make up its mind.

Am I correct in understanding that in these cases, although the manufacturer is one party before the Court of Claims, the party that may bring out potential mitigating circumstances is the Civil Division of the Justice Department?

Mr. HIGHLAND. I am afraid I am not the one to answer your question.

Senator BAUCUS. I am just curious as to who is to represent the other points of view—who might draw out the potentially mitigating circumstances before the Court of Claims.

Mr. HIGHLAND. That is one of the concerns, in a sense, that we have tried to address by trying to ask Congress to speak to what factors, among others, should narrow the scope of those who appear before the Court of Claims.

Senator BAUCUS. That is why I am asking the question. This is not the same kind of case as where, for example, a consumer group sues a manufacturer or a manufacturer sues the Government for recovery from the Government.

Mr. HIGHLAND. It is not analogous, for instance, to the cases such as Tris or other consumer product hazards where the Consumer Product Safety Commission acts as a forum to hear all points of view and makes a judgment. Certainly groups like the Environmental Defense Fund that have been involved in such cases would not be involved in the Court of Claims.

Senator BAUCUS. Yes, and I asked the question also because thus far we have no position from the Justice Department on the bill. The Justice Department in the previous Administration was opposed to the bill. I suspect, frankly, that the present Justice Department either will not publicly take a position, or if they do one will still wonder what that position is.

This leads me to wonder how effectively the Civil Division of the Justice Department may be in pointing out the potential mitigating circumstances. There is no easy answer there.

One could say: "OK, Court of Claims, you can have jurisdiction over any party who wants to file a claim against Uncle Sam." That is one extreme. The other is to send up an S. 1, or some bill that has 1,000 pages, referring only to claims or potential claims of apparel manufacturers. It seems to me we have some obligation to do what is right here.

Particularly in the case of the Court of Claims or at least these potential proceedings, the usual adversarial procedure might not be as joined as might otherwise be the case. I just raise that for consideration.

I have no further questions, Mr. Chairman.

I just received a letter from the CPSC, and I would ask that it be made a part of the record. Essentially, the letter outlines the agency's position favoring the bill, but toward the end they do suggest two recommended changes: One, the amendment that the firms destroy the product or turn over the product for destruction before they are entitled to indemnification; and the second suggested amendment is generally—as I can determine from reading the letter—that there be some prohibition against recovery where the firm intentionally sells the product, in keeping with Congressman Gore's point generally, as I understand it.

Senator EAST. We will certainly make it a part of the record. Without objection, it will be inserted at this point.

[The letter referred to by Senator Baucus follows:]

U.S. CONSUMER PRODUCT SAFETY COMMISSION,
Washington, D.C., May 5, 1981.

Hon. MAX BAUCUS,
Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR BAUCUS: This letter is in response to your request for the comments of the Consumer Product Safety Commission on S. 823, a bill "To provide for the payment of losses incurred as a result of the ban on the use of the chemical Tris in apparel, fabric, yarn, or fiber, and for other purposes."

For more than five years the Consumer Product Safety Commission, the industry, consumers, scientists, the Congress, the courts, the press, and even the world community have been involved with Tris-treated children's sleepwear. In these comments we cannot adequately summarize all of the facts that have developed and the issues that have arisen during that time. Nevertheless, we will provide some background information that we hope will be helpful to this Committee's consideration of S. 823.

Between 1971 and 1976, the children's sleepwear industry treated some of its sleepwear garments and fabric with a chemical flame retardant called Tris (2, 3-dibromopropyl) phosphate to meet federal flammability performance standards. Different types of firms within the industry played different roles in this Tris treatment. Chemical firms manufactured the Tris and sold it to converters and to manufacturers of fiber, yarn, and fabric. No industry-wide description can pinpoint the stage of the process at which Tris was added—it differed among the various manufacturing chains. One generalization, however, is worth noting. When the sleepwear manufacturers (the cutters and sewers of the pajamas) bought fabric from the mills and other processing firms, they did not necessarily know whether it was treated with Tris. They would have known that it met the federal government's performance requirements for the flammability of children's sleepwear. Most retailers similarly would not necessarily have known what method had been used to assure that the fabric met the flammability requirements.

A period of growing concern about possible health risks presented by Tris was focused in February 1977 when the National Cancer Institute published preliminary results of its rat and mouse Tris caused cancer in both species. In that same month, the Environmental Defense Fund petitioned the Commission to ban Tris-treated

children's sleepwear. After carefully evaluating the NCI cancer data and developing its own scientific data on how much Tris children could ingest or absorb, the Commission concluded that Tris-treated children's sleepwear put children at risk of developing cancer.

Based on early scientific risk data, the industry had voluntarily stopped treating children's sleepwear with Tris sometime during 1976. Therefore, the Commission's enforcement actions against the sleepwear and fabric, beginning in 1977, primarily affected the goods that were on the shelves of retail stores and were otherwise "caught" in the channels of distribution. Since the CPSC was stopping the continued retail sale of the Tris goods, the industry as a whole was forced to absorb economic losses from the goods that were already manufactured but were now illegal to sell. The fabric mills, the sleepwear manufacturers, other segments of the industry, various trade associations, the federal government, and a consumer group have struggled in the courts and before congressional committees to resolve the issue of how the losses should and would be allocated.

The Commission's enforcement activities continue to this day because some of the goods caught in the pipeline in 1977 remain in storage and could appear in retail stores. In June 1978 the Commission issued mandatory orders to all the firms it believed were holding Tris goods. The orders required firms to report the amount of Tris-treated garments and fabric they possessed and to notify the Commission prior to any future disposition of their inventory. All the firms responded to the order, and 76 reported inventories that totalled approximately nine million Tris-treated garments and almost one million yards of Tris-treated fabric.

Since the fall of 1979, the Commission staff has monitored the storage of these Tris inventories and the destruction of more than 40 percent of the nine million garments. About 3.9 million garments and thousands of yards of fabric have been cut into industrial wiping rags or have otherwise been destroyed. An additional 1.4 million garments and 387,000 yards of Tris-treated fabric are waiting to be cut into industrial rags. Nevertheless, almost five million garments and almost all of the yard goods identified in 1978 remain in storage.

Unfortunately, the CPSC staff has found that a number of garments have recently been offered for sale to consumers in different parts of the country. One reason for this continuing pressure on the retail market is that the economic loss allocation issue remains open. Firms are apparently reluctant to destroy or otherwise dispose of Tris goods as long as indemnification legislation might result in payments to the firms that still hold them.

Government indemnification of private parties always involves a difficult balancing of factors. Budget constraints and the possible setting of unwarranted precedents are among the factors that must be weighed. Since Tris indemnification is primarily an ecomonic and policy issue, we defer to the Administration's and the Congress' judgment on the overall merits. However, the CPSC's expertise is safety and we must point out that the enactment of indemnification legislation could serve at least two safety-related purposes:

1. If some or all of the private parties now holding Tris goods are indemnified, they can be explicitly required to give the goods to the government for destruction or to destroy them under government supervision. This would effectively assure that those Tris goods will never be sold to consumers.

2. Some industry parties have held Tris goods over the years or have destroyed them because they would not take the chance of letting them reach consumers. We believe that other industry parties handling Tris goods have acted in less responsible ways. Therefore, any indemnification legislation should bar payments to firms that are found to have knowingly acted without sufficient regard for the public's health and safety interests. This would send business the message that the government does not reimburse firms that choose to take any chances with health and safety.

The Commission appreciates this opportunity to submit comments on this ligislation. We would be happy to cooperate with the Congress in providing any additional facts about the Tris situation or in exploring further the issues raised by indemnification

Sincerely,

STUART M. STATLER,
Acting Chairman.

Senator EAST. Thank you, Mr. Highland. We appreciate your coming. Without objection, we will insert your prepared text in the record.

Senator BAUCUS. Is it my understanding, Mr. Chairman, that the record will be held open until we have received an answer from the Department of Justice?

Senator EAST. It will. Without objection, that will be included at this point. The subcommittee, however, will not have jurisdiction over S. 823 after today since it reverts to the full Judiciary Committee.

[Material submitted by Senator Baucus follows:]

STROM THURMOND, S.C., CHAIRMAN
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QUENTIN CROMMELIN, JR., STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

MEMORANDUM FOR THE RECORD

At the conclusion of the first day of hearings on S. 823, I requested that the hearing record be held open until the Subcommittee had received the views of the Department of Justice on S. 823. Chairman East agreed to my request and the record was left open.

On May 4, 1981,and again on September 16, 1981, as Ranking Minority Member of the Subcommittee on Separation of Powers, I wrote Attorney General Smith (see attached letters) requesting the Department's position on S. 823. Unfortunately, I have not received any kind of response to either of my two letters.

Since we are nearing the end of the first session of the 97th Congress, the hearing record on S. 823 should be closed so that the record may be printed and distributed to all interested parties.

I can only conclude that the Department of Justice stands by its views of similar legislation introduced in the 95th Congress. I have attached a copy of those views so that they may be included in the record.

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
December 16, 1981

STROM THURMOND, S.C., CHAIRMAN
CHARLES MC. MATHIAS, JR., MD.
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EMORY SNEEDEN, CHIEF COUNSEL
QUENTIN CROMMELIN, JR., STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

May 4, 1981

Honorable William French Smith
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

As you may know, S. 823, legislation that would indemnify companies that may have been hurt by the Government ban on TRIS treated sleepware, is once again before the Congress.

The Department of Justice was strongly opposed to this legislation when it was introduced in the 95th Congress. I have attached for your convience a copy of the Department's previous statement on this legislation. Since the Department was adamantly opposed to this legislation on the grounds that it set a dangerous and expensive legal precedent, I would appreciate receiving the Department's current views of S. 823.

Thank you for your attention to this matter. I would appreciate receiving your comments as soon as possible so that the Congress may act on this issue.

With best personal regards, I am

Sincerely,

Max Baucus
Ranking Minority Chairman
Subcommittee on Separation
of Powers

United States Senate

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(1) 800-332-6106

September 16, 1981

Honorable William French Smith
Attorney General
Department of Justice
Washington, DC 20530

Dear Mr. Attorney General:

By letter dated May 4, 1981, I requested the Department of Justice's current views on S. 823, a bill to indemnify companies that may have been hurt by the government ban on TRIS treated sleepwear. I have yet to receive a response to that letter.

In order that the hearing record may be completed and so that I and my colleagues may have a more complete understanding of the issues involved with this legislation, I would appreciate receiving your views on S. 823 as soon as possible.

With best personal regards, I am

Sincerely,

Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers

Committees

Environment and Public Works
Finance
Judiciary
Small Business

Billings
657-6790

Bozeman
586-6104

Butte
782-8700

Great Falls
761-1574

Helena
449-5480

Missoula
728-2043

Statement of James F. Merow, Chief, Court of Claims Section, Civil Division

SUMMARY OF PRINCIPAL POINTS

As detailed in the following statement, the Department of Justice opposes enactment of the relief legislation proposed because the type of claim involved is one where the courts have consistently denied Government liability. Legislation admitting Government liability for Tris losses would be preferential treatment. Moreover, no such liability should be enacted, in any event, in the absence of any actionable level of "fault" or wrongdoing by the Government causing the loss.

Finally we point to several problems in the implementation of the proposed legislation were it to be enacted, and suggest amendments to preclude any reimbursement for losses incurred on material manufactured or placed in the marketplace (domestic or foreign) after information was available showing Tris-treated material to be hazardous, so that a prudent person would cease its use.

STATEMENT

Mr. Chairman and Members of the Committee, I am James F. Merow, Chief of the Court of Claims Section, Civil Division, Department of Justice.

I appear today pursuant to the invitation extended to the Department by Chairman Rodino to submit the views of the Department of Justice on H.R. 7158 and S. 1503. These bills would grant jurisdiction in the United States Court of claims to render judgments against the United States in favor of persons who sustained certain losses as a result of the actions taken by the Consumer Products Safety Commission (CPSC) on April 8, 1977, and thereafter, in issuing its interpretation that certain apparel, fabric, yarn or fiber containing Tris—a flame retarding chemical, are banned hazardous substances under Section 2(q)(1)(A) of the Federal Hazardous Substances Act.

The steps leading up to the Commission's action on April 8, 1977 are set forth in Senate Report 95-584, to accompany S. 1503 and I will only state them briefly here.

In response to a demonstrated need to end burn injuries to children, in 1971 the Secretary of Commerce first issued children's sleepwear apparel flammability standards under the Flammable Fabrics Act. This required that the sleepwear meet an objective flammability standard determined by a uniform test method. (16 F.C.R. 1615). Testimony presented during the Senate hearings on S. 1503 [Hearing before the Tris Hearing Panel of the Committee on the Judiciary, United States Senate, 95th Cong., 1st Sess., July 26, 1977] indicated that prior to the 1973 effective date of the flammability standards the predominate fabric used in children's sleepwear was cotton. [Statement of Leo J. Feuer, President, William Carter Co., Hearings, pp. 89, 97].

However, cotton fabrics could not be produced which would meet the standards and still be acceptable to consumers—after treatment to produce flame retardant characteristics, cotton flannel was no longer aesthetically appealing. [Testimony of David T. Shirey and Fred Shippee, Hearings, pp. 49, 50, 57-58]. Some five or six synthetic fibers were available which could meet the standard of which only the polyester, acetate and triacetate required treatment with a chemical such as Tris. [Hearings, pp. 57-58, 87, 97].

However, sales of garments made with fabrics other than polyester did not prove successful so that, by reason of consumer acceptance, the industry switched predominately to polyester garments after 1973 [Hearings, pp. 57-58, 86-87, 97-98]. Thus, by 1976 Tris-treated fabrics were in extensive use in the industry [*Ibid.*].

In January of 1976 test data became available that showed TRIS caused certain mutations, and that the test used had been shown to be a 'highly reliable predictor' of carcinogenicity [42 Fed. Reg. 18850, April 8, 1977 (document number 3, Ames, B. to Dr. B. L. VanDuuren)]. At this point one of the largest of the children's sleepwear manufacturers, William Carter Co., discontinued further use of Tris. In the Senate Hearings, Mr. Leo P. Feuer, President, William Carter Co. stated, "Carter's stopped the use of Tris prior to any adverse information from the National Cancer Institute study. Early in 1976, after the newly developed so-called Ames screening test indicated that Tris was a mutagen, Carter's considered it prudent to discontinue future use of Tris." [Hearings, p. 99].

In March 1976, the Environmental Defense Fund petitioned the Consumer Product Safety Commission to require cautionary labeling for Tris-treated apparel. [42 Fed. Reg. 18850, April 8, 1977]. The CPSC conducted a search of existing literature, initiated a biological testing program and asked the National Cancer Institute to expedite studies underway. [*Ibid.*]. On February 4, 1977 the CPSC obtained the preliminary NCI test data. After analysis, the Environmental Defense Fund petitioned the CPSC to ban Tris-treated wearing apparel, and on April 8, 1977 the CPSC

issued its interpretation that children's wearing apparel made from fabric containing Tris, and uncut fabric intended for sale to consumers for use in children's wearing apparel, are banned hazardous substances. This interpretation, in turn, required that unwashed garments be repurchased by retailers from consumers and from retailers by the manufacturers, etc.

To the extent that Tris-treated garments, fabric, yarn or fiber can no longer be sold, there are obvious losses to the industry. The pending legislation raises the question as to whether the taxpayers should bear any or all losses sustained by the industry, stemming from the April 8, 1977 action by the Consumer Product Safety Commission.

It is our position that the United States should not bear the losses involved. We are opposed to the enactment of this legislation for the same reasons which were stated in the Department's testimony before the Senate Hearing Panel on S. 1503. In Report 95–585, p. 5, the Senate Committee stated its view that our arguments "* * * can be more than adequately rebutted." I would like to restate our arguments here and, I hope, in the process demonstrate that the Committee's analysis has not rebutted them.

Our first point is the established state of the law that the Government is not liable for the economic impact of regulatory action of the form involved here. This principle has consistently served to defeat claims asserted in the courts against the United States. It is discussed in the case of *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 608–11; 372 F. 2d 1002, 1009–1011 (1967). Report 95–585, p. 6 concedes this point, but responds that this only indicates the need for legislation. Our point, however, is that because the general precedent is established which denies relief, it would be preferential treatment to single out Tris claims for unique treatment. If liability is legislated for losses suffered by one category of persons relating to banned hazardous products, a precedent is established which would make it difficult to deny similar relief to all persons who have suffered losses, or who will suffer such losses relating to hazardous products, now and in the future.

The Senate Committee's ultimate conclusion is to premise liability in the Tris situation upon "* * * the double-edged aspect of Government regulation. That is the Department of Commerce required the industry to use a chemical like Tris in sleepwear and, when in good faith the industry did so, the Consumer Product Safety Commission banned Tris-containing sleepwear." [Report, pp. 8–9].

However, the facts, as developed in the Senate Hearings, show that the emphasis on the production of Tris-treated fabrics stemmed from consumer choice—not commerce Department mandate and the industry shift away from Tris-treated fabrics may well have occurred even absent the CPSC action of April 8, 1977 as is shown by the decision by the William Carter Co. to discontinue its use early in 1976, when test data became public showing that Tris was a mutagen. [Hearings, p. 99].

Undoubtedly, with adverse publicity concerning the safety of Tris-treated fabrics occurring in 1976, some market loss must be attributable to this. The Senate Report states that "public knowledge" of the studies concerning the safety of Tris-treated fabrics occurred "* * * only as a result of the Commission's ban." [Report, p. 7], but surely this ignores the fact that some portion of the industry apparently stopped using Tris in 1976 and in March of 1976 the Environmental Defense Fund commenced its public efforts to gain action by the Commission. As noted in our prior testimony before the Senate, because the proposed bills do limit the Government's liability to loss as a result of the Commission's April 8, 1977 actions, and its actions thereafter, it will be necessary, in the litigation the bills authorize, for claimants to prove that their losses stemmed from this action and not from the market reaction to publicity concerning the potential cancer problems involved. It will also be necessary for the Government to cover this issue in its defense to the claims. This will be a complex and difficult issue to address. Without addressing the issue, however, compensation would flow to persons who would have suffered losses even absent the actions of the Consumer Product Safety Commission, and to persons who continued to manufacture and sell Tris-treated materials after it was prudent not to do so.

Accordingly, our first point is that the law is establishd that the Government is not liable for this loss, that this places the economic burden on the industry, and that the general law is designed to do this to provide the incentive not to place hazardous products in the marketplace. If liability is legislated in this circumstance, a precedent is established for liability by the taxpayers each time new information is discovered which shows that a product utilized by industry to meet a Government regulatory standard is hazardous. For example, if the automobile manufacturers utilized products to meet fuel mileage or pollution requirements, is the Government to guarantee that their losses will be reimbursed if any such products are subsequently discovered or determined to be hazardous? Legislation for Tris claims would establish such a precedent.

In our testimony on S. 1503 before the Senate, I noted the similarity between the claims made here and those made in 1970–72 concerning the 1969 action of the Food and Drug Administration in delisting cyclamates from the so-called GRAS (Generally Recognized As Safe) list. A number of bills were introduced to compensate persons who claimed to have suffered losses as a result of using cyclamates in reliance upon their GRAS listing. The asserted basis for relief in the cyclamate situation was good faith reliance upon the GRAS listing so that losses stemming from its delisting, based upon the discovery that the substances are dangerous should be borne by the Government. I noted that enactment of this Tris legislation could be cited as a precedent to justify compensation in the cyclamate situation. In Report 95–584 the Senate Committee responds by citing the fact that in 1972 the Department of Justice testified in favor of relief in the cyclamate situation, asserting that the situation was extraordinary. [Report, p. 6].

However, the instant claims for losses in the similar Tris situation demonstrate that the position asserted by the Department in 1972 was incorrect. As more care is taken to examine products in response to Congressional mandates to protect the public from health and safety hazards, it is inevitable that the same issue of compensation will constantly arise. Our point in opposition to this legislation is that relief should not be given on such a piecemeal basis. If the general law is to be changed to place liability on the Government for the costs of banned hazardous products, it should be accomplished by general legislation applicable to all similar circumstances.

Moreover any such legislation would need careful guidelines to retain incentives for the development of safe and nonhazardous products and which would deny compensation to those who placed goods in the marketplace after they had, or should have had, knowledge as to the hazardous conditions. A further problem would be presented as to who would bear the cost of any liability which the manufacturer or producer may incur to consumers as a result of the hazardous nature of the products involved, and what effect any Government compensation should have on such liability. In short, this is a subject of much complexity and not one which should be resolved by establishing the precedents which legislating admission of liability in the cyclamates or Tris situations would engender.

I should note that one cyclamate claim is in litigation. Pursuant to Senate Resolution 225, 95th Cong., 1st Sess., Senate Bill S. 1894, to provide compensation to California Canners and Growers has been referred to the Chief Commissioner of the Court of Claims for litigation pursuant to the Congressional Reference procedure provided in 28 U.S.C 1492, 2509. This procedure requires litigation to determine whether the claimant has a valid legal or equitable claim against the United States and, if so, the amount. The end result is a Report by the Chief Commissioner which is submitted to Congress for any legislative action deemed appropriate. The Department of Justice has filed its answer denying any liability and the case will now proceed through the litigation process. This procedure should be contrasted with that utilized in S. 1503 and H.R. 7158 where Congress admits liability and the Court's function is to determine the amount of the liability and to enter judgment.

Our second basis for opposition to the enactment of S. 1503 or H.R. 7158 is the fact that these bills place liability on the Government absent any area of fault which would be the basis of legal liability were the Government not involved. The Senate Committee in Report 95–584, p. 6 responds that "Thus, the preoccupation with fault seems to miss the point of S. 1503 altogether. Children's sleepwear manufacturers were done an injustice because of actions by the Federal Government, and the purpose of S. 1503 is to correct that injustice." The "injustice" cited by the Committee appears to be based mainly on the fact that the Commerce Department set very high children's sleepwear flammability standards which, given the consumer preference as to fabrics which followed, resulted in the extensive use of Tris-treated polyester fabric. [Report, p. 6]. We see no injustice in requiring high flammability standards for children's sleepwear.

If safe, flame retardant children's sleepwear could not be developed the question is raised whether the product should be marketed. Moreover, the record developed in the Senate Hearing on S. 1503 made it clear that the industry knew that there could be problems with chemical treatments—in fact, the industry representatives objected to the standards on this basis. To use the words of David T. Shirey, testifying in support of S. 1503 for the American Apparel Manufacturers Association, "The Federal Government said meet the standard. We raised the question about possibility of side effects, and the Government said 'go fly your kite,' in effect—and passed the standard anyhow. They gave us two years. We struggled like mad, and only had one or two—" [Senate Hearings, p. 54]. The testimony of Dan M. Byrd for the American Textile Manufacturers Institute, Inc. is to like effect. [Senate Hearings, p. 59]. Of course, to our knowledge, no information was available in 1971 that flame retardant chemicals such as Tris could potentially cause cancer, but the

industry was aware that they were not tested and chose to proceed with their use. The alternative might well have been not to put a product in the market if the risk was considered too great—but the fact that there was a risk was known to the industry. The question raised is whether compensation by the Government would have been appropriate if the companies claimed, at that point, they could not meet the standard set by the Commerce Department and, in effect, lost their business in children's sleepwear.

The point, in our view, is academic because they did proceed, and given the information concerning Tris which emerged in 1976, it simply cannot be said that the interpretation by the Commission in April of 1977 that the products were banned hazardous substances constituted an injustice. The theory of S. 1503 and H.R. 7158 is not to compensate the industry for the dislocations which may well have occurred in the switch from cotton to Tris-treated polyester in the early 1970's. Were this the theory, relief would be granted to those companies who tried to market naturally flame retardant fabrics and failed or companies who went out of business entirely as was noted in the testimony of Donald Comer, Jr., American Textile Manufacturers Institute, Inc. [Senate Hearings, p. 87.]

The theory of S. 1503 and H.R. 7158 is to compensate companies for losses incurred when new information is developed to show that products used to meet federal standards are hazardous. To call either the original standards, designed to prevent burning children, or the ban, some years later, to prevent potential cancer in children, an "injustice" to industry is to open the Government to liability when no actionable "fault" has been shown. This should be contrasted with the situation in *Mizokami* v. *United States*, 188 Ct. Cl. 736 (1969) where there was "fault" found by the Food and Drug Administration in erroneously seizing and condemning 418 bushels of spinach as purportedly contaminated by a hazardous chemical. The spinach was not, in fact, contaminated by the chemical. In the analogous situation of "equitable" relief under the Congressional Reference procedure of 28 U.S.C. 1452, 2509, some level of fault must be shown to obtain a determination of liability by the Government. *See Burt* v. *United States*, 199 Ct. Cl. 897, 906–907 (1972).

In Public Law 94–284 which Congress recently passed as applicable to certain actions of the Consumer Product Safety Commission, liability was permitted for covered actions if the appropriate level of fault could be shown. Senate Report No. 95–584, p. 7 notes that Public Law 94–284 would, perhaps, not cover the Tris situation, but the point we are making is that liability without fault, as proposed by S. 1503, H.R. 7158 is a serious departure from past precedents, which we oppose. If the claimants had been able to demonstrate that the Commission's action of April 8, 1977 and thereafter was erroneous on its merits (that, *e.g.*, goods not containing Tris were banned) then *Mizokami* would be a precedent—but that is not the situation now before Congress. We reassert our "fault" point and consider that, contrary to the statement in Report 95–584, it is very much in issue with respect to the matter of relief as provided in S. 1503 or H.R. 7158.

We also wish to note that enactment of this legislation will mandate complex and time-consuming litigation in the Court of Claims, and we question whether this is the most effective way to provide monetary relief if such relief is determined to be appropriate. In Senate Report 95–584, p. 7, the Committee construed our point on the use of complex adversary litigation to grant monetary relief as an assertion that neither the Court of Claims nor the Department of justice has sufficient resources to handle the suits to be filed if S. 1503 or H.R. 7158 were to be enacted.

Our point was not that the capability is lacking, but whether the method of adversay litigation should be used. We do not know how many suits will be filed—but there are at least 100 companies in the industry. [Senate Hearings, p. 100.] H.R. 7158 would provide relief to unlimited categories of persons, perhaps including consumers, and a very substantial number of claims could be expected. S. 1503 limits the type of claimant who could file suit and the type of loss to be recovered, and fewer claims would be filed under this language. However, if only 100 claims were filed, substantial time would be required to resolve them. Our experience would indicate that no less than 30 attorney-days of work would be needed to bring each such claim to conclusion. Pleadings must be prepared, discovery proceedings conducted, accounting schedules submitted, audited and responded to under the Court's unique pretrial rules keyed to such damage-type cases. Trials must be conducted when issues of fact arise. Briefs and findings of fact must be prepared for the Trial Judges and, on review by the Court, the issues must be briefed and argued before a three-judge panel in each case. Thus if one assumes only 100 claims and, very conservatively, 30 attorney-days for each proceeding from beginning to end, some 3,000 work-days are involved for our attorneys. At 240 workdays per year per attorney, this will consume work equivalent to the full-time efforts of 12 attorneys for one year.

This does not include support personnel, such as the accountants at the Federal Bureau of Investigation who perform the audits required by the Court's pretrial rules. We do not consider adversary litigation to be the most desirable method to provide compensation for loss related to banned hazardous substances if this compensation is to be legislated. Rather, by analogy to the general legislation applicable to compensation when the Agriculture Department destroys animals to prevent the spread of, disease, 21 U.S.C. 114a, 134a, the agency administering the program should be the one to provide any compensation mandated, with litigation reserved for controversies which might ensue. For example, in the program to eliminate Exotic Newcastle Disease in poultry in southern California in 1971–1972, some $56,000,000 was paid by the Agriculture Department to growers, but only one law suit has emerged to date—*Julius Goldman's Egg City* v. *United States*, Ct. Cl. No. 364-75.

Accordingly, in summary, we maintain our opposition to this legislation as, if enacted, it will establish a precedent which will be utilized to justify relief for the economic impact of regulatory action. For the taxpayers to assume this liability, not sanctioned under current law, may well run counter to the obvious deterrent aspect involved in placing such economic liability on the persons subject to regulation to insure that products sold to the public are safe. This is, in our view, a matter for general legislation after careful study.

We are attaching an appendix of suggestions to cover more recent developments should this legislation be enacted over our continuing opposition.

APPENDIX

The language of H.R. 7158 does not define the costs to be recovered, nor does it indicate how the compensation is to interact with the repurchase requirements of Section 15 of the Federal Hazardous Substances Act, 15 U.S.C. 1261, et seq. S. 1503, as it was enacted in the Senate, removes much of this problem, but we still note a situation which would cause controversy. The testimony introduced before the Senate Committee indicated that the fabric mills would not reimburse the garment manufacturers for the value of the fabric involved. [Hearings on S. 1503, p. 67]. However, should such refunds have been made, the damage computation mandated by S. 1503 does not expressly provide that they must be deducted in determining the "cost" of the fabric. Moreover, the language in the Report, p. 7, that the Court should take into consideration any such refunds "• • • a person receives or is entitled to receive • • •" raises the point in each case as to whether there is "entitlement" to a refund. If so, the question can be raised in another suit, by the person who should pay a "refund," whether he can include this liablility in his claim against the United States. If only the "liability" can be included, how can one be assured it will be paid over to the manufacturer when recovered from the Government? S. 1503 simply does not cover this as now drafted.

We also suggest that it be made clear that double payments for the same material are not sanctioned. For example, a processor of the fabric or yarn would initiate a claim for the same material that is being claimed by the manufacturer of the end item—clearly payments should not be made for the cloth to both the mill and the factory producing the garment.

Finally, there are two additional points which it is considered the Committee should address. First, there have been news reports recently (e.g., Wall Street Journal, May 8, 1978; Washington Post, May 6, 1978) that substantial amounts of tris-treated garments are being exported, and the Consumer Product Safety Commission has voted to extend its enforcement action to exports. Given the present knowledge of the hazardous status of these garments, exporting them should not be condoned, and should clearly not be rewarded. Accordingly, we recommend that if this legislation is to be enacted, that additional provisions be incorporated to require, as a condition for any compensation, that the claimant prove to the satisfaction of the Court of Claims that the material, for which the compensation is to be paid, has been destroyed, preferably in an environmentally safe manner, as sanctioned by the Environmental Protection Agency, or has been utilized (or will be utilized) in a product other than children's wearing apparel. This will also serve to prevent the possibility that after receiving compensation for its cost, a claimant could dispose of the garments or fabric by export or otherwise where it could cause the harm which has resulted in the interpretation by the Consumer Product Safety Commission that it is a banned hazardous substance.

Second, we suggest that the persons who would receive compensation were this bill to be enacted might well have a cause of action against those concerns who supplied them with a hazardous substance, such as Tris, or Tris-treated fabric. Accordingly, again as a condition for the payment of any compensation, we recommend that language be incorporated into this bill mandating that any and all such

claims be assigned to the Government by each claimant who obtains relief so that the Department of Justice can, if it is deemed appropriate, take action to recoup any compensation paid from those who might well be liable. There is a precedent in Court of Claims litigation to require a claimant to execute a document in connection with obtaining a monetary judgment. *Jensen* v. *United States*, 158 Ct. Cl. 333, 342 (1962).

We also oppose the imposition of liability without the presence of some Government fault. Finally, we suggest that if this bill is to be enacted it be modified to preclude relief for the cost of any Tris-treated material manufactured or exported (or otherwise placed on the market as children's wearing apparel) after knowledge was gained as to its hazardous nature or such knowledge should have been gained. Also, as a condition for compensation there should be required: (1) proof of destruction of any such material or of its conversion to material not interpreted to be banned hazardous substances; and (2) an assignment to the Government of all claims against suppliers of that Tris or Tris-treated material which relates to any compensation obtained under this Act by any claimant.

Senator EAST. The subcommittee will stand adjourned.

[Whereupon, at 4:25 p.m., the hearing was adjourned.]

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